

# A Bedroom of One's Own: Morality and Sexual Privacy after *Lawrence v. Texas*

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## INTRODUCTION

"What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails."<sup>1</sup>

If Justice Scalia's dire prediction in *Lawrence v. Texas* comes true, Texas, Georgia, Mississippi, Alabama, Louisiana, Kansas, and Colorado may no longer be able to forbid the sale of vibrators, dildos, and other "sex toys" within their borders. These states have enacted legislation to inhibit activity in the sex toys market.<sup>2</sup> Under the now discredited *Bowers v. Hardwick*, which upheld

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1. *Lawrence v. Texas*, 123 S. Ct. 2472, 2490 (2003) (Scalia, J., dissenting). Justice Scalia noted in his *Lawrence* dissent that:

Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. See, e.g., *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001) (citing *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)), in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality . . . indisputably is a legitimate government interest under rational basis scrutiny."

2. See TEX. PENAL CODE ANN. § 43.21, 43.23 (Vernon 2003); GA. CODE ANN. § 16-12-80 (2003); MISS. CODE ANN. § 97-29-105 (2000); ALA. CODE § 13A-12-200.2(a)(1) (1975 & Supp. 2003); LA. REV. STAT. ANN. § 14:106.1 (2003); KAN. STAT. ANN. § 21-4301 (2003); COLO. REV. STAT. § 18-7-101, 102 (2003).

The Supreme Courts of Kansas and Colorado struck down their obscene device statutes as overbroad and a violation of privacy rights. See *State v. Hughes*, 792 P.2d 1023, 1032 (Kan. 1990) ("We hold the dissemination and promotion of such devices for purposes of medical and psychological therapy to be constitutionally protected activity. . . . The State has demonstrated no interest in the broad prohibition of distributing the devices in question sufficiently compelling to justify the infringement of the rights of those seeking to use them in legitimate ways."); *People v. Seven Thirty Five Colfax, Inc.*, 697 P.2d 348, 368 (Colo. 1985) ("[T]he statutory scheme impermissibly burdens the right of privacy.").

Alabama's statute is currently under constitutional attack. See *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) (finding no fundamental right at stake, but remanding the case to district court for further consideration of Alabama's ban on the sale of vibrators and dildos). On remand, the district

criminalizing same-sex sodomy, the government was free to label the sale of sex toys as a "crime" by prosecuting it under the banner of morality.<sup>3</sup> As Justice Scalia laments, however, *Lawrence's* overruling of *Bowers* may change all that by restricting the scope of permissible government intrusion in the bedroom.

Indeed Texas, the home of the sodomy law struck down in *Lawrence*, is currently writing yet another morality play that pits sexual privacy against the forces of the government. Joanne Webb, representative for a company called "Passion Parties" and mother of three, has been cast reluctantly in the leading role.<sup>4</sup> A "passion party" is a Tupperware party-like gathering that replaces the clean and airtight food storage containers with vibrators and exotic lotions.<sup>5</sup> The cozy gatherings that propelled Earl Tupper's rather mundane invention into the domestic hall of fame in the 1950s combined product demonstrations with intimacy and camaraderie.<sup>6</sup> In a similar manner, "Passion Parties" allow a woman like Joanne Webb to display sex-enhancement products for sale and explain how they work in a comfortable, private home setting.<sup>7</sup>

It is here, however, that the comparison between plastic and passion ends. Although selling plastic containers is legal and perhaps profitable, selling passion in Texas can get you a year in jail and a \$4000 fine.<sup>8</sup> In the Texas case, undercover police officers, posing as a married couple in need of some

court again struck down the law as a violation of the right to privacy. *Williams v. Pryor*, 220 F. Supp.2d 1257 (N.D. Ala. 2002). The appeal of that decision is pending.

The Louisiana Supreme Court upheld the state's obscenity statute, stating that it did not violate the Louisiana constitution's right to privacy because that right does not extend to purchasing or promoting obscene devices. Nevertheless, the court struck the statute down as not rationally related to a legitimate interest because it did not contain a medical exception for the use of vibrators where therapeutically appropriate. *See State v. Brennan*, 772 So.2d 64 (La. 2000).

Georgia, Texas, and Mississippi statutes prohibiting the sale of obscene devices have withstood Constitutional attacks on various grounds. *See Sewell v. Georgia*, 233 S.E.2d 187 (Ga. 1977), *appeal dismissed*, 435 U.S. 982 (1978) (holding statute providing any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material not unconstitutionally vague or overbroad); *Regalado v. State*, 872 S.W.2d 7 (Tex. Ct. App. 1994) (holding that constitutionally protected right to privacy does not include use of or possession with intent to promote obscene devices); *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985) (upholding statute criminalizing promotion of and possession with intent to promote obscene devices upheld as legitimate exercise of state police power, justified under rationale of protecting the societal interest in order and morality); *PHE Inc. v. State*, 2004 WL 527836, \_\_\_ So.2d \_\_\_ (March 18, 2004) (upholding Mississippi obscenity statute because the commercial sale of sexual devices not protected by Mississippi constitution's right of privacy).

3. *See Bowers v. Hardwick*, 478 U.S. 186 (1986).

4. *See Mireya Navarro, Women Tailor Sex Industry to Their Eyes*, N.Y. TIMES, Feb. 20, 2004, at A1; Laurie Fox, *Was Hers a Crime of Passion?* DALLAS MORNING NEWS, Dec. 20, 2003, at 1B.

5. *See Leonard Pitts, Deep in the Heart of Texas They're Nuts*, CHI. TRIB., Feb. 17, 2004, at 19.

6. It was a woman, Bonnie Wise, who came up with this marketing idea. She ultimately became a multi-millionaire by understanding her market and selling clean, casual, and efficient suburban living to the taste of women in charge of the kitchen, ironically providing home business opportunities to many of them in the process. *See ALISON J. CLARKE, TUPPERWARE: THE PROMISE OF PLASTIC IN 1950S AMERICA* (2001).

7. *See generally Pitts, supra* note 5.

8. *Id.*

bedroom spice, purchased a vibrator, and Webb helpfully explained how to use it. For explaining a vibrator's role in sex, Webb was charged with obscenity.<sup>9</sup>

Texas, of course, is not the first state to be unduly concerned with its constituents' sexual expressions. Over the years, many states have devoted their limited prosecutorial resources to policing bedrooms for violations of laws forbidding fornication, adultery, and sex aids.<sup>10</sup> Although many state legislatures have repealed such laws, some outlying states maintain fidelity to this type of sexual morality regulation. The recent decision in *Lawrence* poses the question of whether the Constitution allows the government to bring its handcuffs into the consenting adult's bedroom.

Consider, for example, Alabama's anti-vibrator law. Alabama claims an interest in banning "the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation, or familial relationships,"<sup>11</sup> and in discouraging "prurient interests in autonomous sex."<sup>12</sup> Alabama asserts, "the pursuit of orgasms by artificial means for their own sake is detrimental to the health and morality of the State."<sup>13</sup> In *Williams v. Pryor*, decided before *Lawrence*, the Eleventh Circuit vigilantly guarded the legislature's right to protect morality against the onslaught of autonomous sex behind the closed doors of the bedroom. The Court rejected a facial challenge and upheld the statute, effectively finding that one's right to sexual privacy protects only those acts performed with another consenting adult's body.<sup>14</sup> Sexual privacy rights do not protect an individual's sexual expression using toys or devices, even if the individual prefers such devices to a physical partner in the interests of avoiding pregnancy and sexually transmitted diseases, or achieving an orgasm.<sup>15</sup>

The Supreme Court has discussed procreation, privacy, and sex in a number of court decisions.<sup>16</sup> These decisions leave a trail of mysterious clues that lead in conflicting and circuitous directions. *Lawrence v. Texas*, which

9. *Id.*

10. See generally RICHARD A. POSNER & KATHERINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 98-110 (1996).

11. *Williams v. Pryor*, 41 F. Supp. 2d 1257, 1284-93 (N.D. Ala. 1999).

12. *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001).

13. *Id.* (quoting Alabama's appellate brief). In a Louisiana case concerning a similar statute, the legislative history indicated that the law was passed as a "simple way of helping in the war on obscenity." *State v. Brennan*, 772 So. 2d 64, 73 (La. 2000).

14. *Williams v. Pryor*, 240 F.3d. at 949-50 (Given Alabama's legitimate legislative interest in "discouraging prurient interests in autonomous sex, . . . Alabama did not act irrationally by prohibiting only the commercial distribution of sexual devices, rather than prohibiting their possession or use or by directly proscribing masturbation with or without a sexual device.").

15. On remand, the District Court of Alabama found that the adult plaintiffs had a fundamental right to sexual privacy and the state had no compelling interest in banning the sale of sex aids to them. *Williams v. Pryor*, 220 F. Supp.2d 1257 (N.D. Ala. 2002). Of course, pre-*Lawrence* precedent was typically skeptical of such a fundamental right. See discussion, notes 33-47, *infra*.

16. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992).

gave constitutional protection to same-sex adult sodomy, is the latest signpost on this trail and a good example of the Court's problematic jurisprudence.<sup>17</sup> The Supreme Court's opinion avoids formulating a specific rule to guide discretion, opting instead to emphasize "distinguishing factors" – hints that suggest the roads not taken in the decision.<sup>18</sup> Nevertheless, Justice Scalia's dissent, with its ominous prophecy that *Lawrence* will be the death of legislation banning sex aids and other "morality crimes," provides a tantalizing promise of a potentially broad application.<sup>19</sup>

Part I of this Article details and critiques generally the Supreme Court's past precedent limiting constitutional privacy and liberty rights. Although the Court's past analysis purported to honor history and tradition, in fact, the "history and tradition" test undermines the notion of constitutional privacy rights in both design and practice. Moreover, by using history and tradition in interpreting the limits of substantive due process, the Court allowed gender discrimination to infect constitutional interpretation. The result is a contaminated analysis.

Part II discusses the history of sex aids—specifically devices intended to allow women to achieve orgasm—in the context of their history and tradition.<sup>20</sup> Surprisingly, vibrators have a history and tradition of non-regulation.<sup>21</sup> This history begins with their centuries-old, medicinal usage and concludes with their more recent appearances in the Sears Roebuck catalog as "Aids That Every Woman Appreciates," listed along with sewing machines, electric fans, and household mixers.<sup>22</sup> More generally, however, a survey of this history of sex aids reveals gender bias in the study and understanding of female sexuality.

Part III examines the interaction between gender bias in legal and medical applications, specifically in the case of sex aids. Bias can operate in a facially neutral fashion, especially when that bias is deeply embedded in culture. Ultimately, medical stereotypes can infect case law, and medical bias can reinforce gender stereotypes in the law.

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17. 123 S. Ct. 2472 (2003).

18. See discussion, notes 189-195 *infra*.

19. See *supra* note 1.

20. Of course, a potential buyer can easily evade such a clumsy law by purchasing "body" massagers. More than 30 years ago, a book advertised as "[t]he first HOW-TO book for the female who yearns to be ALL woman," advised its readers that vibrators were inexpensive and "on display in most drug stores" and because they were advertised as "facial massagers" they could be purchased without embarrassment. J., *THE SENSUOUS WOMAN* 43 (1969). One court judicially noted this fact, stating that "personal massagers" that can perform as vibrators "are being sold every day at stores such as Wal-Mart or K-Mart, to customers who intend to use them only for genital stimulation." *State v. Brennan*, 739 So. 2d 368, 373, *aff'd*, 772 S.2d 64 (La. 2000). Indeed, with some marketing skill, the whole problem disappears, with colorful names such as "Flexi-lover" becoming a "Massag-o-matic." See Regalado v. State of Texas, 872 S.W.2d 7, 8 (Tex. App. 1994), *cert. denied*, 513 U.S. 871 (1994).

21. See generally RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM: "HYSTERIA," THE VIBRATOR, AND WOMEN'S SEXUAL SATISFACTION* (1999).

22. *Id.* at 104-05.

Part IV details how states enforce statutes outlawing devices such as vibrators and dildos. From arrest through appeal, states take the duty to protect public morality seriously. Unlike outdated and unenforced laws, the prosecutions of these laws result in convictions and jail sentences. These laws are not just quaint artifacts of an earlier time and place – Alabama's law was passed in 1998<sup>23</sup> – and prosecution under these laws results in convictions and jail sentences.

Part V seeks legal enlightenment in the *Lawrence* majority opinion and searches for clues as to what the decision means for sexual privacy generally, and for sex aids specifically.

This article concludes that, whether viewed as a right of liberty or privacy, the government should not have the authority to interfere with private adult sexual activities, whether with other consenting adults or as assisted by inanimate objects. This conclusion, however, is coupled with the caution that the deliberately vague and ambiguous *Lawrence* decision is not a revival of the broad *Griswold v. Connecticut* and *Eisenstadt v. Baird* approach to privacy.<sup>24</sup> In changing the approach from a search for a fundamental right to recognition of a liberty interest, the Court creates a more open and undefined right. At the same time, however, the Court reduces the level of scrutiny for government infringements of the right to one that resembles “rationality with bite.”<sup>25</sup> Finally, *Lawrence* provides many judicial emergency exits for use if future cases seek to expand the reasoning beyond the Court's comfort level.

The change in focus is a narrow victory for liberty and privacy interests, at most shifting the burden to the government to justify its reasons for impinging those interests. The justification required of the government could be nothing more than naming a “legitimate” reason. The *Lawrence* approach, however, offers liberty and privacy interests as an opportunity for a more heightened review, but under carefully circumscribed conditions. Its application, not surprisingly, will depend upon the proclivities of the Court that applies it in the next case. Perhaps the most important reminder in *Lawrence* is that the Supreme Court is often not very far from the national mainstream. Although the Court may provide a check on outlier jurisdictions, political processes ultimately provide the primary protection of our individual liberty interests.

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23. See *Williams v. Pryor*, 220 F.Supp.2d 1257, 1262 (N.D.Ala. 2002).

24. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See *infra* notes 28-32 and accompanying text.

25. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-22 (1972) (describing a level of equal protection scrutiny labeled “mere rationality” by the Supreme Court, but applied with a more searching judicial inquiry into the legislative means and ends than the traditional and deferential “toothless” rational basis review).

# I. A BRIEF HISTORY OF THE SUBSTANTIVE DUE PROCESS PRIVACY DOCTRINE BEFORE *LAWRENCE*

What is the extent of our constitutional liberty and privacy interests? There are at least two possible theories: (1) certain fundamental rights exist that, once established, require the government to justify intrusion upon them with compelling interests and narrowly tailored means; or (2) a liberty interest exists in which people retain a certain spatial, decisional, or personal privacy that requires the government to justify intrusion at some, yet to be defined, level. The first theory reflects Justice Blackmun's approach in *Roe v. Wade*,<sup>26</sup> and the second theory reflects Justice Kennedy's opinion in *Lawrence*.<sup>27</sup> The thirty years between the issuance of these opinions has been a time of heated political, social, and academic debate over the limits of judicial interpretation of the Constitution with privacy rights as the focal point.

Several decades ago, the Supreme Court struggled to find a constitutional theory that would prevent Connecticut from banning the sale of contraceptives. In *Griswold v. Connecticut*, the Supreme Court held that constitutional privacy protected a married couple's use of birth control measures.<sup>28</sup> The *Griswold* opinion relied heavily on the existence of a marital relationship.<sup>29</sup> Seven years later, in *Eisenstadt v. Baird*, this constitutional privacy interest in access to contraception was extended to unmarried persons.<sup>30</sup> The relatively quick jump that the Supreme Court made in *Eisenstadt* from married to unmarried persons seemed to give hope that sex could be uncoupled from marriage, and sexual privacy protected in its own right.<sup>31</sup> The Supreme Court seemed to set the ground level for the privacy right, not the ceiling: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>32</sup> As the Court

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26. *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

27. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

28. 381 U.S. 479, 486 (1965).

29. *Id.* ("We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

30. 405 U.S. 438, 453 (1972) ("If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible.").

31. *See id.* ("Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.").

32. *See id.* This ruling came only 45 years after the decision in *Buck v. Bell*, where the Supreme Court declared that concern for public health gave the state the power to prevent procreation. Virginia had authorized sterilization for "mental defectives" and Justice Holmes heartily endorsed the idea and its constitutionality: "It is better for all the world, if instead of waiting to execute degenerate offspring for

struggled to untangle sex, marriage, and procreation, privacy collided with the abortion issue in *Roe v. Wade*,<sup>33</sup> where the Supreme Court held that the right of privacy encompassed a woman's right to choose to have an abortion under some circumstances. A highly politicized debate overshadowed the legal doctrine.

From the time of *Griswold*, *Eisenstadt*, and *Roe*, the constitutional right of privacy became the object of an embittered battle among the Justices on the Supreme Court. A series of subsequent decisions extensively cut back the expansive and free-floating right enunciated in *Roe*. In attempts to develop interpretive tools for broad open-ended language, theories that rest on original meaning, history and tradition, and the concept of liberty have been test-marketed as ways to develop a safe and effective formula, one that does not unleash an uncontrollable judicial Frankenstein.<sup>34</sup> The Justices who wanted to expand the doctrine used vague language<sup>35</sup> and the Justices who want to contract it, used narrow language.<sup>36</sup>

Substantive due process became characterized by a series of confusing decisions concerning parental rights, suicide, homosexuality, and abortion, joined by an increasingly eccentric legal doctrine that reflected the internal disagreements. Identifying the constitutional right to privacy required one to keep updating an ever-changing master list. The list included: (1) the right to use contraceptives;<sup>37</sup> (2) abortion (sometimes), although the state can make getting one difficult;<sup>38</sup> (3) the right to refuse medical treatment (perhaps);<sup>39</sup> (4) enough "painkillers" for the terminally ill to permanently end suffering

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crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." 274 U.S. 200, 205, 207 (1927). But see *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down, on equal protection grounds, a criminal statute authorizing the sterilization of thrice-convicted felons, declaring "marriage and procreation [to be] fundamental to the very existence and survival of the race").

33. The Supreme Court held that this "right of privacy" was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153.

34. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (using history and tradition as the benchmark "to rein in the subjective elements" and to avoid "the need for complex balancing of competing interests in every case.")

35. Thus, in *Griswold v. Connecticut*, the Court found a privacy right for married women to use contraceptives in "penumbras" of specific provisions "formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. Then, in *Roe v. Wade*, the Justices could not agree where in the constitution the liberty interest resided, but stated that it was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153.

36. See *infra* text accompanying notes 37-46.

37. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

38. See, e.g., *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992) (finding women's right to make a decision to obtain an abortion before fetal viability protected under the substantive due process doctrine, and state may not subject that right to "undue burdens.").

39. See, e.g., *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261 (1990) (assuming significant liberty interest in refusing unwanted medical treatment, but upholding state's interest in imposing restrictions on withholding medical treatment in case of person in persistent vegetative state).

(perhaps), but not physician assisted suicide for the terminally ill;<sup>40</sup> and (5) the right to guide and control your children<sup>41</sup> (but not the right of a biological father to have a relationship with a daughter born of an adulterous relationship when the biological mother still is married and her husband chooses to raise the daughter as his own).<sup>42</sup> Now, after the *Lawrence* decision, we can add (6) adults practicing consensual sodomy in private—although Justice Kennedy never tagged it with the label “fundamental right.”

The two most successful strategies that some Justices employed in crushing the substantive due process privacy doctrine were: (1) isolating the privacy right so narrowly that purporting to raise it to the level of a constitutional right would seem absurd;<sup>43</sup> and (2) requiring a historical pedigree so pure as to guarantee that majoritarian rule had to have generally protected the right in all but a few outlier states.<sup>44</sup> In *Washington v. Glucksberg*, a case examining whether there was a protected liberty interest in assisted suicide, these strategies officially became part of the test for finding a fundamental right, and for achieving a heightened level of scrutiny.<sup>45</sup> Without such a level of scrutiny, a rational relationship test applies. Showing that there is no rational basis for a given intrusion is often too high a barrier to leap over, although the sporadic inconsistency of the Supreme Court in applying the test encourages continual attempts.

According to *Glucksberg*, to establish a right as fundamental, one first needs to describe the right specifically. Then, one must show that the specifically described right is so deeply rooted in this Nation’s history and traditions, and so “implicit in the concept of ordered liberty,” that “neither liberty nor justice would exist if [it] were sacrificed.”<sup>46</sup> Although this is a “minimalist’s” test in theory, because it moves constitutional law along at a case-by-case pace,<sup>47</sup> in practice, newly recruited fundamental rights are unlikely to survive this constitutional boot camp.

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40. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (finding no fundamental right to assisted suicide).

41. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923) (invalidating a statute that prohibited teaching young children in any language other than English and affirmed the fundamental right of an individual “...to marry, establish a home and bring up children.”); *Pierce v. Soc. of Sisters*, 268 U.S. 510, 534-535 (1925) (striking down a law requiring parents to send their children to public school, as “unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”); *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (holding there is a fundamental right of parents to make decisions regarding child’s care, custody and control).

42. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

43. See, e.g., *Bowers*, 478 U.S. at 190. See *infra* text accompanying notes 49-59.

44. See generally Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 201 (1993) (“[t]radition has more recently become almost a litmus test — an all but insuperable bar to the litigant who fails to invoke it in support of a new constitutional claim”).

45. 521 U.S. 702, 721 (1997).

46. *Id.* at 721 (citing *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

47. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).



There were many problems with the *Glucksberg* test and its application including: (1) the initial phrasing of the right; (2) the sometimes-dubious appeal to history and tradition; and (3) the poison pill outcome. As to the latter effect, the *Glucksberg* test defines a fundamental right, ostensibly endorsing the concept, but the test itself kills any hope of ever finding a fundamental right. Justice Scalia's dissent is correct that the *Lawrence* opinion does not follow this immediate past precedent.<sup>48</sup> As discussed below, that the *Glucksberg* test may be temporarily interred—perhaps to be recalled when convenient—is no reason to mourn.

### A. Fundamental Rights under a Microscope

Like the conventional wisdom that a lawyer wins or loses a trial case when choosing the jury, whether an activity “wins” fundamental right status often seems to depend on how broadly or narrowly the courts frame the question before them. Requiring specificity in the definition of a fundamental right is a relatively recent development in the doctrine of substantive due process,<sup>49</sup> and one not friendly to the concept of fundamental rights generally. It allows one to make the question the variable, and the desired answer, the constant; by being very specific, one can craft a rhetorical question where the obvious answer will exclude the questioned activity from coverage as a fundamental right.<sup>50</sup> In other words, ask a silly question and you will get a silly answer.

*Griswold* and *Eisenstadt* both involved the ban on the sale of contraceptives, and the Supreme Court phrased the issue as one involving the constitutional right to decide whether to procreate, not the constitutional right to buy a condom.<sup>51</sup> The question asked was a general and philosophical one, not one directed to the specific methodology or circumstances involved in exercising the right. In the later cases, however, the Court abandoned this broad approach to framing the question for a more constricted one. Thus, a privacy right was not phrased as whether people had “the right to be let alone,” but rather whether they had the right to engage in homosexual sodomy,<sup>52</sup> not to determine the manner and circumstances of one's death when terminally ill, but to commit suicide,<sup>53</sup> not to have a relationship with a biological child, but to

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48. *Lawrence*, 123 S. Ct. at 2488.

49. See *infra* notes 51-52 and accompanying text.

50. See *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 420 (1947) (Frankfurter, J., dissenting) (“But answers are not obtained by putting the wrong question and thereby begging the real one.”).

51. *Griswold*, 381 U.S. at 485-86.

52. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986). Contrast Justice Blackmun's dissent where he framed the right as “the fundamental interest all individuals have in controlling the nature of their intimate associations with others” because they are necessary to “an individual's self-definition.” *Id.* at 204-06 (Blackmun, J., dissenting).

53. *Cruzan*, 497 U.S. 261 (1990).

have a relationship with a biological child born of an adulterous relationship where the mother and her husband decide to raise the child as their own.<sup>54</sup>

There are many examples of the absurd results that this approach produces. For example, in *Michael H. v. Gerald D.*, the plurality stated that “[w]e have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman’s existing marriage with another man.”<sup>55</sup> The failure to prove this very specific protection in our history and tradition meant that the biological father of a child, who had an established relationship with the child, had no constitutional right to any parental relationship with the child. The key to this result was emphasizing specifically that the biological father was an adulterer and the child’s mother chose to stay within her marriage—facts that overrode the more general presumption that a parent and child had a constitutionally protected relationship.<sup>56</sup> The child’s claim to a relationship with her biological father was dismissed because the plurality asserted that there was no support in our history or traditions that a state had to “recognize multiple fatherhood.”<sup>57</sup>

The same game can be played in the cases involving sex aids. At one point in the *Williams* litigation, the Eleventh Circuit sent the case back down to the district court with instructions to determine “whether our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons.”<sup>58</sup> Contrast that result with another more specific question a different court framed when considering the same issue: “Does the due process clause of the Fourteenth Amendment guarantee a citizen the right to stimulate his, her or another’s genitals with an object designed or marketed primarily for that purpose? Put another way, is there a right to stimulate human genital organs with an object designed or marketed as useful primarily for that purpose, such that the right is a ‘fundamental’ one ‘implicit in the concept of ordered liberty?’”<sup>59</sup>

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54. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

55. *Id.* at 125.

56. *Id.*

57. *Id.* at 131. The plurality opinion does not hide its moral judgment of the parties. Introducing the relationship of the four main parties, Justice Scalia notes, “The facts of this case are, we must hope, extraordinary.” *Id.* at 113. In other words, the world of Michael and Carol, and Gerald and Victoria was literally a Peyton Place. To prove the point about our histories and traditions, the opinion takes us back to 1836 and H. Nicholas’ *Alduterine Bastardy*, and of course, Blackstone’s explanation of the exception was “be out of the kingdom of England . . . for above nine months.” *See id.* at 124 (citing WILLIAM BLACKSTONE, COMMENTARIES 456 (J. Chitty ed. 1826)). Apparently, at that point, even the law could not tolerate the legal fiction necessary to paper over the marital schism. Of course, all of the policy judgments that girded these commentators’ reasoning melt away in these days of DNA tests where paternity can be determined with relative ease. No one asks whether Blackstone would have commented the same way if there had been DNA testing in England at the time of his writing.

58. *Williams v. Pryor*, 240 F.3d 944, 955-56 (11th Cir. 2001).

59. *Yorko v. State*, 690 S.W.2d 260, 262 (Tex. Crim. App. 1985) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

It is not hard to discern the nature of this game. Framing the question in a particular way provides an easy way to influence the outcome. Asking the question at a very specific level is not only a way to constrict the doctrine, but to shut it down if that outcome is preferred.

### B. Tradition and History

As articulated in the *Glucksberg* test, history and tradition are a critical part of analyzing a substantive due process challenge. It is not a method, however, without some madness attached to it.<sup>60</sup> First, protection of rights consistent with tradition privileges the present ruling order because the notions traditionally accepted by the electorate are granted with an extra layer of legitimacy. Moreover, even assuming an intellectual pedigree can be assigned to the requirement,<sup>61</sup> determining what history is traced, during what period, and through whose lens it is viewed, all present significant choices that will determine what one produces as the historical record.<sup>62</sup> In the hands of lawyers, history may become an adversarial tool to justify a result, rather than an accurate picture of our past to inform the result.<sup>63</sup>

The description of the history and tradition of an activity's regulation may vary depending upon the perspective of the viewer. The *Lawrence* decision, for example, criticizes the inaccuracy of the historical analysis of the *Bowers* decision that came to the opposite conclusion on the historical regulation of homosexual sodomy.<sup>64</sup> *Lawrence* looked at evolving history in a very specific manner, while *Bowers* looked at the history in a more general manner.<sup>65</sup>

60. See generally Adam B. West, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101 (2002).

61. *Id.*

62. LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 98, 99 (1991); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES (1995).

63. Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL'Y 809 (1997); Brown, *supra* note 44, at 210-11.

64. See *Lawrence v. Texas*, 123 S. Ct. at 2480 ("In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.").

It is ironic that the *Lawrence* court added a new dimension of specificity to the *Glucksberg* test, given the existing, restrictive requirement that the right be described in *specific* terms. In *Lawrence*, Justice Kennedy searches for a history and tradition of prosecution of homosexual sodomy conducted in private by two consenting adults—a very specific description—opposed to a history of statutes outlawing sodomy. The *Lawrence* court used "specificity" with regard to this prong of the test as a tool for expanding the scope of matters historically protected. The more specific one is, however, the harder it is to spot a tradition or history that will bar the claim. It is easier to find a "history and tradition" at a general level. It is a way to turn history and tradition into an easily manipulated rule.

65. See *Bowers v. Hardwick*, 478 U.S. 186, 192-94 ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights . . . In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws . . . In fact, until 1961 . . . all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.")(citations omitted).

Furthermore, the historical framework is not always suitable because we are often forced to fit very specific medical and technological advances (such as assisted reproduction) into the framers' linguistically challenging phrasing, composed in a time when leeches and bleeding were accepted as good medical practices.

Finally, the requirement that the right must be deeply rooted in tradition and history is relatively recent.<sup>66</sup> There was no such requirement in *Roe* with regard to abortion, or *Griswold*<sup>67</sup> and *Eisenstadt*<sup>68</sup> with regard to contraceptives. Indeed, *Roe* illustrated the difficulty of applying the requirement through the majority and dissenting opinions, which came to two contrary conclusions on the historical issue.<sup>69</sup>

Thus, Justices Kennedy and Scalia debated in *Lawrence* which part of the historical timeline should count when history reflects different standards. Although Texas did not recognize it, Justice Kennedy emphasized an "emerging recognition" and acceptance of homosexual sodomy,<sup>70</sup> while Justice Scalia maintained that the fact that sodomy was criminalized at some point in this timeline sufficiently rebuts the notion that the right to engage in this act was ever deeply rooted.<sup>71</sup> In Justice Kennedy's view, our most recent past becomes our history and tradition. By using "recent history," he reconstructed the dead hand of the past and fashioned it into a reflection of present national majority will, or even international will.<sup>72</sup> Recent history then is used to pull the outlier jurisdictions into the fold. This new approach is perhaps as troubling as the *Glucksberg* test,<sup>73</sup> however, because what the majority wants now is generally protected by the majority at the polls, and we are as lost as ever in determining the core "liberty" or "privacy" values that the Constitution protects.

Moreover, gender discrimination infects history, and when a historical pedigree is required to justify a fundamental right, it ensures that gender

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66. See discussion accompanying notes 49-57, *supra*.

67. *Griswold v. Connecticut*, 381 U.S. 479, 485-86, 505 (1965). See generally Wolf, *supra* note 60, at 119-120 ("Historically, misogynistic attitudes have proscribed the availability of contraceptives. Such attitudes often were codified by statute, including the very laws held unconstitutional in *Eisenstadt* and *Griswold*, which were on the books for more than eighty and ninety years, respectively.") (citing Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 356 (1992)).

68. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

69. Compare *Roe v. Wade*, 410 U.S. 113, 129-47 (1973), with *id.* at 174 (Rehnquist, J., dissenting).

70. *Lawrence*, 123 S. Ct. at 2480 ("[W]e think that our laws and traditions in the past half century are of most relevance here.").

71. *Id.* at 2494.

72. In relying on domestic indicators, Justice Kennedy noted the Model Penal Code and the repeal of state criminal sodomy laws. *Id.* at 2480. He also noted recent European government actions that supported his view. *Id.* at 2481.

73. See *supra* note 45.

discrimination is embedded in the fundamental rights analysis.<sup>74</sup> This phenomenon is critical in the area of female sexuality. The law historically not only treats women as second-class citizens, but also granted males dominion over female bodies and sexuality.<sup>75</sup> For example, one might claim a fundamental right to one's own decisional and bodily autonomy in refusing sexual intercourse, even within a marriage. Yet the history and tradition of male ownership of the female body, as exemplified in the marital rape exemption, would rebuff this claim.<sup>76</sup> In part, the marital rape exception was entwined with biased medical accounts of women's sexuality that claimed that sexual intercourse with a conscious and healthy woman was not possible without her consent.<sup>77</sup> Thus, an analysis that respects our nation's history and traditions can easily be an analysis that respects gender discrimination as well.

Chief Justice Burger provided us with another vivid illustration of the problem of male centered history.<sup>78</sup> In his concurring opinion in the now overruled *Bowers* case, he emphasized that there was "no such thing as a fundamental right to commit homosexual sodomy," relying in part for authority on Blackstone's description of sodomy as an offense of "deeper malignity" than rape and "a crime not fit to be named."<sup>79</sup> This is easy for Blackstone to say and Burger to cite; as males, they probably did not fear the predatory sexual violence of rape.<sup>80</sup> That lack of empathy led them to make the insensitive and erroneous judgment that consensual sodomy is more horrific than rape.<sup>81</sup>

74. Nor is this criticism a revolutionary one. Abigail Adams admonished founding father John Adams to "remember the ladies," as he set out to frame the new government, but he replied, "[w]e know better than to repeal our Masculine systems." 1 ADAMS FAMILY CORRESPONDENCE 370, 382 (1963).

75. See generally CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000) (detailing the history of the marital rape exemption).

76. See Hasday, *supra* note 75.

77. See Elizabeth Ann Mills, *One Hundred Years of Fear: Rape and the Medical Profession*, in JUDGE, LAWYER, VICTIM, THIEF: WOMEN, GENDER ROLES AND CRIMINAL JUSTICE 29, 44-45 (Nicole Hahn Rafter & Elizabeth A. Stanko eds., 1982); Morris Ploscowe, *SEX AND THE LAW 170-74* (1951) (noting the medical experts' opinion that women in good health cannot be raped because they should be able to resist penetration).

78. See MAINES, *supra* note 21, at 65 (noting male bias in the interpretation of data by male historians). This point extends to interpretations of medical data as well. *Id.*

79. *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 215.)

80. Blackstone reflected the unenlightened approach of his time, but that is no excuse for repeating the mistakes of history. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*430-33; see also 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 109 (New York, O. Halstead 1827) ("The general rule is, that the husband becomes entitled, upon the marriage, to all the goods and chattels of the wife, and in the rents and profits of her lands, and he becomes liable to pay her debts, and perform her contracts."). See generally NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 51-54 (1982) (summarizing analysis of Blackstone's COMMENTARIES). See also Hasday, *supra* note 75 (detailing the history of the marital rape exception).

81. The replication of gender discrimination within the rubric of "tradition" is also present in Justice Scalia's dissent in an equal protection case that forced Virginia to allow the admission of women into its all-male military academy. See *United States v. Virginia*, 518 U.S. 515, 569 (Scalia J., dissenting) (1996) (arguing that the all male military academy was justified by analogizing to the "tradition of sending only men into military combat.").

*C. Implicit in the Concept of Ordered Liberty*

The last part of the *Glucksberg* test, that the right must be “‘implicit in the concept of ordered liberty,’”<sup>82</sup> is the prong that acts as the failsafe mechanism. It sets up an exceedingly difficult barrier.<sup>83</sup> The test protects only those rights essential to the functioning of a democratic society, such as those already specifically listed in the Bill of Rights and possibly a few others, such as the right to be free of torture.<sup>84</sup> Whether the right of privacy in this context would meet that standard is an open question. Torture or forced medication or life support could be distinguished based on their affirmative intrusion into bodily integrity. Moreover, “ordered liberty” is a double-edged concept and can be used as easily to justify government intrusions into liberty as it can be to protect liberty interests from government intrusion.<sup>85</sup> Thus, this prong is too vague and malleable to serve as a protective layer for privacy rights in general or sexual privacy rights specifically.

For those who dislike the implications of the doctrine of substantive due process and do not want to try struggling with the many difficult issues it raises, the *Glucksberg* test is the perfect solution. By offering three independent grounds on which a fundamental right can be denied, the *Glucksberg* test allows Justices to maintain fealty to the theory while simultaneously rejecting all claims with ease.

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82. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The phrase “implicit in the concept of ordered liberty” is drawn from *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). *Palko* employed this phrase to test which provisions of the Bill of Rights were fundamental enough to be incorporated against the states through the concept of liberty in the due process clause of the Fourteenth Amendment.

83. See, e.g., *TRIBE & DORF*, *supra* note 62, at 104 (“Through his [tradition] methodology, Rehnquist, like Scalia, is engaging in damage control; his concerns are not merely to decline to extend [fundamental rights], but also to gut the cases of any vitality or generative force.”); Brown, *supra* note 44.

84. *Palko* rejected the proposition that immunity “from compulsory self-incrimination” was part of the “essence of a scheme of ordered liberty,” but did state that “[n]o doubt there would remain the need to give protection against torture, physical or mental.” 302 U.S. at 325-26. The Supreme Court later held that the right to jury trial was incorporated based on the test that the guarantee “was fundamental to the American scheme of justice,” rather than the theoretical inquiry of whether the right was necessary to democratic government. *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968).

85. See *Sell v. United States*, 123 S. Ct. 2174, 2185 (2003) (stressing concept of government’s interest in “ordered liberty” in the context of a court determining whether the forced administration of drugs to render a defendant competent to stand trial is justified).

## II. TRADITION, HISTORY, AND HYSTERIA: FEMALE SEXUALITY AND THE HISTORY OF VIBRATORS

In recent opinions such as *Glucksberg*<sup>86</sup> and *Lawrence*,<sup>87</sup> the Supreme Court has made the discussion of history and tradition a mandatory part of any substantive due process conversation. The *Lawrence* opinion spends a great deal of time arguing that private, consensual sodomy was not historically prosecuted, criticizing the opposite conclusion reached by the Court in *Bowers v. Hardwick*,<sup>88</sup> and illustrating the slippery nature of the Court's historical test. It is unclear from the *Lawrence* opinion, however, what the relevant referential timeframe is, and what level of protection or lack thereof needs to be present.

Moreover, even if we set aside the question of whether there is a sound and consistent method to arrive at a decisive statement of history and tradition, an analysis of the history of sex aids supports finding a privacy interest in private adult use of sex aids. First, private adult masturbation traditionally has not been criminalized.<sup>89</sup> Likewise, there is no significant history or tradition of regulating sex aids such as vibrators and genital massage. In fact, there is a tradition of their legal use, although one coupled with a history of medical misunderstanding and ignorance of women's sexuality.

### A. A Miracle Cure without a Disease

Physicians used genital massage as early as the middle 1600's to treat female "hysteria" or "womb disease."<sup>90</sup> The symptoms of womb disease included fainting, insomnia, headaches, and, of course, the tendency to be very cranky.<sup>91</sup> The invention of electricity sped up the treatment by allowing the rather lengthy hand massage process to be reduced to a ten-minute treatment.<sup>92</sup>

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86. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

87. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

88. 123 S. Ct. at 2478-80.

89. See RICHARD POSNER, *SEX AND REASON* 207 (1992) ("... masturbation (at least when solitary and in private) has never been made a crime, even though both in the early Christian era and in Victorian England (and America) it was regarded... as a serious offense against good morals, a crime against unborn generations, a factor predisposing the perpetrator to sex crimes, and a form of attempted suicide, all rolled into one."). See generally *Williams v. Pryor*, 220 F.Supp.2d 1257, 1277-94 (reviewing history and tradition of sexual privacy in marriage); THOMAS W. LAQUEUR, *SOLITARY SEX: A CULTURAL HISTORY OF MASTURBATION* (2003).

90. See generally MAINES, *supra* note 21. A 1653 medical text written by Pieter van Forest described the treatment: "[M]assage the genitalia with one finger inside, using oil of lilies, musk root, crocus, or similar." *Id.* at 1. The word "hysteria" comes from the Greek word meaning "that which proceeds from the uterus." *Id.* at 21. Maines notes that the word "[h]ysterical thus combines in its connotations the pejorative elements of femininity and of the irrational: there is no analogous word "testicular" to describe, for example, male sports fans' behavior during the Super Bowl." *Id.*

91. *Id.* at 1, 8, 23.

92. *Id.* The first patented vibratory machine, called "The Manipulator," was steam powered and as big as a dining room. It came with the warning that supervision of females was necessary "to prevent overindulgence." *Id.* at 15. Portable, at-home vibrators came into fashion in the early 1900's. Sears

Doctors apparently saw the benefits of using faster electrical devices to treat more patients and bring in more fees.<sup>93</sup> Genital massage was lauded as a miracle cure for its ability to alleviate so many different symptoms so quickly. Before the American Psychiatric Association caught on and changed the medical criteria in 1952, "hysteria" was "one of the most frequently diagnosed diseases in history."<sup>94</sup>

Over the centuries, a variety of devices were invented to supplement or replace hand massage.<sup>95</sup> Indirect methods such as horseback riding, train travel, the vibrations of a sewing machine, and bicycles all had their adherents.<sup>96</sup> Other devices, such as vibrating helmets and jolting chairs met with mixed success.<sup>97</sup> Electromechanical vibrators were used in medicine in 1878.<sup>98</sup> Both men and women were treated with these devices.

The at-home version of the cure appeared publicly at the turn of the twentieth century. An advertisement for a home vibrator named "Vibratile" turned up in McClure's magazine in March 1899, promising a cure for "Neuralgia, Headache, and Wrinkles."<sup>99</sup> The "American Vibrator," advertised that the device "may be attached to any electric light socket, can be used by yourself in the privacy of dressing room or boudoir, and furnishes every woman with the very essence of perpetual youth."<sup>100</sup> Vibrating genital massagers were sold in the Sears Roebuck catalog until the 1920s, ranging in price from \$5.95 to \$28.75 for the deluxe model.<sup>101</sup> As smaller electrical handheld vibrators were developed, the role of the medical profession disappeared with no real resistance from physicians, perhaps because the time

Roebuck listed its vibrator under "Aids That Every Woman Appreciates." Advertisements featured the vibrator, described as "very useful and satisfactory for home service," along with sewing machines and household mixers. *Id.* at 104-105.

93. Doctors apparently considered genital massage time-consuming, messy, and hard on the wrists. *Id.* at 4, 67-68.

94. *Id.* at 3-5, 11. Not all physicians, however, were in favor of the cure of genital massage to induce orgasm; when the speculum came into use as an examination tool, there was concern that it acted as a dangerous device for inducing orgasmic pleasure. For instance, Maines quotes one physician in 1853 sounding the alarm:

No one who has realized the amount of moral evil wrought in girls . . . whose prurient desires have been increased by Indian Hemp [marijuana] and partially gratified by medical manipulations, can deny that remedy is worse than the disease [hysteria]. I have . . . seen young unmarried women, of the middle-class of society, reduced by the constant use of the speculum to the mental and moral condition of prostitutes; seeking to give themselves the same indulgence by the practice of solitary vice; and asking every medical practitioner . . . to institute an examination of the sexual organs.

*Id.* at 58 (quoting ROBERT BRUDENELL CARTER, ON PATHOLOGY AND TREATMENT OF HYSTERIA 69 (London, John Churchill 1853)).

95. *Id.* at 67-110.

96. A book that directed how best to achieve this excitement, in these situations, went through six editions and twenty-seven printings by 1923. *Id.* at 89-90.

97. *Id.* at 91.

98. *Id.*

99. *Id.* at 100.

100. *Id.* at 103 (quoting GOOD HEALTH PUBLISHING COMPANY, TWENTIETH CENTURY THERAPEUTIC APPLIANCES 64-73 (1909)).

101. *Id.* at 104-05.



required for the treatment was annoying even before the time constraints of managed care.<sup>102</sup>

Despite the use of vibrators and genital massage as a medical therapy to induce orgasm in women, it is far from clear that a woman's sexual pleasure was in itself important, as opposed to an occasional nuisance to be satisfied as a remedy for other ailments. During the nineteenth century, expert opinion was that sexual intercourse was healthy for women, but there was a difference of opinion as to whether orgasm was required.<sup>103</sup> Of course, recognizing the importance of intercourse, without a corresponding role for female orgasm, satisfied male concerns with a minimum of effort. Expert concern centered on the fear that "manipulation of the clitoris by the partner or by the woman herself would lead directly to compulsive masturbation, nymphomania, or an outright rejection of intercourse."<sup>104</sup> The anxiety about the "potential to unsettle heterosexual hierarchies" translated into medical apathy at best and conscious disregard at worst.<sup>105</sup> Medical textbooks ignored the clitoris,<sup>106</sup> although there is some evidence that, in the 1920s and 1930s in the United States, "expert" opinion in marital sex manuals reflected the importance of female orgasm and clitoral stimulation, but placed responsibility for achieving both upon the male partner.<sup>107</sup>

### B. Freudian Slips

From the 1930s to the 1960s, vibrator advertising disappeared.<sup>108</sup> Concerns were expressed about female addiction to the device and "male

102. *Id.* at 67. As Maines notes, there is no evidence that the physicians enjoyed the task of remedying hysteria. *Id.* at 4, 67, 113-14 ("All the evidence points to their having generally considered it a tedious, difficult, and time-consuming chore and having made efforts to delegate the task to subordinates or machines even in ancient and medieval times.").

103. *See id.* at 53; Jane Gerhard, *Revisiting "The Myth of the Vaginal Orgasm": The Female Orgasm in American Sexual Thought and Second Wave Feminism*, 26 FEMINIST STUD. 449, 452 (2000).

104. Gerhard, *supra* note 103, at 452; *see also* MAINES, *supra* note 21, at 53-54.

105. Gerhard, *supra* note 103, at 452.

106. *See* Gerhard, *supra* note 103, at 452 ("Early-nineteenth-century anatomy textbooks noted the existence of the clitoris but believed that, unlike the supposedly analogous penis, the clitoris was passive and unimportant to female sexual expression. By the twentieth century, most, including the industry standard *Gray's Anatomy*, did not label the clitoris or discuss its function.").

107. The mixed message of these manuals was that women had sexual "needs," but it was a man's job to awaken and satisfy those needs. *See* Jessamyn Neuhaus, *The Importance of Being Orgasmic: Sexuality, Gender, and Marital Sex Manuals in the United States, 1920-1963*, 9 J. HIST. SEXUALITY, 447, 457-460 (2000) ("If a woman suffered from frigidity, wrote many authors, the blame most likely lay with a clumsy, selfish, or ignorant husband . . . [O]rgasmic sexual pleasure was critical to a woman's good health. Masculine sexual power was absolutely essential, but husbands were bumbling, ignorant, insensitive clods who needed a good course of instruction on pleasuring wives. These contradictions in post-World War I manuals reflect a society grappling with 'the woman question.'").

108. MAINES, *supra* note 21, at 108. After an advertisement in the December 1928 issue of *Popular Mechanics*, Maines notes the absence of vibrator advertising "from home magazines until the modern vibrator resurfaced in the 1960's as a frankly sexual toy." *Id.*

dismay at its efficacy compared to their own efforts.”<sup>109</sup> The shift in focus from the female orgasm to male orgasm was reflected in the post World War II sex manuals that “emphasized the male’s pleasure when defining successful intercourse and made women’s sexual technique responsible for male sexual satisfaction.”<sup>110</sup> Unlike the earlier sex manuals of the 1920s and 1930s, these later sex manuals did not put much stock in the importance of female orgasm, finding it overemphasized the responsibility of the woman, and even unnecessary — urging women to acquire the art of “faking it.”<sup>111</sup>

The popularity of Sigmund Freud’s theories of sexuality was apparent. Freud constructed a theory of female sexuality that distinguished between clitoral and vaginal sexuality, referring to the former as the “immature” form and the latter as the “mature.”<sup>112</sup> Freud’s theory, in summary, was that a young girl’s heterosexual identity “would be consolidated only when the girl shifted her libido away from the mother and the clitoris and on to the father and the vagina.”<sup>113</sup> Much depended upon this transfer, because if not completed, neurotic discontent, penis envy, hysteria, and hostility toward men could result.<sup>114</sup> Psychoanalyst Helene Deutsch carried the Freudian theory further into “healthy” subordination: “the vagina symbolically brought together women’s reproductive and sexual identities, two aspects of women’s psychology that psychoanalysis sought to harmonize under the rubric of innate heterosexuality.”<sup>115</sup> There was a label for those women who did not renounce their clitoris: “frigid.”<sup>116</sup>

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109. *Id.* at 107. In one study, it was asserted that use of an electrical vibrator could produce as many as fifty consecutive orgasms, a stunning number that could support the “excess” claim. See CAROL TRAVIS & CAROLE WADE, *THE LONGEST WAR: SEX DIFFERENCES IN PERSPECTIVE*, 92-93 (2d ed. 1984).

110. Neuhauser, *supra* note 107, at 467.

111. *Id.* at 468 (“In the ‘50’s male sexuality was no longer an unquestioned force, needing only restraint and training. Nor was the husband admonished for his sexual inability. Instead the wife was urged to take more responsibility, to cater to her husband’s needs, and to be aware of the anxiety that a man faced in bed.”).

112. See Gerhard, *supra* note 103, at 452-53; MAINES, *supra* note 21, at 118.

113. Gerhard, *supra* note 103, at 453.

114. SIGMUND FREUD, *THREE ESSAYS ON THE THEORY OF SEXUALITY* (1905), reprinted in 21 *THE STANDARD EDITION OF THE COMPLETE WORKS OF SIGMUND FREUD*, 73-109. (James Strachey ed. & trans., 1953-1974).

115. See Gerhard, *supra* note 103, at 455. Gerhard notes that Deutsch explained that “[v]aginal sexuality, at once mysterious and overpowering, transformed a girl into a woman through its capacity to bring sexual pleasure and reproduction together.” *Id.* at 455.

116. The category of the “frigid” or abnormal women was a broad one in the 1930s and 1940s. Technically, psychoanalysts labeled a woman frigid if she was unable to reach vaginal orgasm through intercourse. But as a diagnosis, frigidity also contained other related concerns about what constituted normal female sexuality. For instance, if a woman was too sexual or too aggressive, she was labeled frigid. Similarly, if a woman did not enjoy intercourse but did enjoy other forms of sexual exchange, she too was ‘frigid.’ At the same time, frigid women also included those deemed to be ‘neurotically undersexual’ or who cared nothing for sexual pleasure. Frigidity thus became a label and a diagnosis that defined how much sexual desire a woman must have and in what kinds of sexual behavior she must engage to be ‘healthy.’

Not only did personal psychological problems flow from the clitoris, but broader societal tragedy as well, including the chaos of women overwhelming men and the resultant destruction of the family.<sup>117</sup> Acceptance of the roles of wife and mother, as well as general passivity were considered normal and crucial.<sup>118</sup> Sexuality was male-centered, culturally established, and labeled as science. If women's sexual satisfaction stemmed from the clitoris—and thus could be achieved independently—then the subordinate and dependent role of women intrinsic to the contemporary understandings of both family and sexuality would be challenged.

### C. *More Theories of Female Sexuality*

Freud's theories conveniently maximized male sexual pleasure by re-defining female sexual pleasure. Yet other studies of human sexual behavior, such as those by Kinsey and by Masters and Johnson lent support to the notion that the vagina was not the center of female sexual pleasure.<sup>119</sup> Masters and Johnson's famous study of sexuality, however, involved female subjects who were chosen because they reached orgasm through coitus.<sup>120</sup> In 1976, Shere Hite pointed this flaw out in her own study: obtaining a representative sample of women who would openly discuss their sexuality, especially when they often suffer from the stigmatizing condition of a lack of orgasm, would never be easy.<sup>121</sup>

In the late 1960s, some women began challenging the Freudian vision of female sexuality. In "The Myth of the Vaginal Orgasm,"<sup>122</sup> Anna Koedt confronted this version of sexuality that had become rooted in not only psychoanalysis, but also medicine and popular culture. As Koedt noted, the "worst damage was done to the mental health of women who either suffered silently with self-blame, or flocked to psychiatrists looking desperately for the hidden and terrible repression that had kept them from their vaginal destiny."<sup>123</sup> Other women writers also began exploring this theme of the interplay between female sexuality and male domination.<sup>124</sup> There was no single voice but the

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117. *Id.* at 458; see also, THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* 243 (1990) (Freud as propagator of the "cultural myth of the vaginal orgasm.").

118. *Id.*

119. See ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 592 (1953) (noting that the vagina was "of minimum importance in contributing to the erotic responses of the female . . . [and] may even contribute more to the sexual arousal of the male than it does to the arousal of the female.") See also WILLIAM MASTERS & VIRGINIA JOHNSON, *HUMAN SEXUAL RESPONSE* (1966).

120. PAUL ROBINSON, *THE MODERNIZATION OF SEX: HAVELOCK ELLIS, ALFRED KINSEY, WILLIAM MASTERS, AND VIRGINIA JOHNSON* 137 (1976).

121. SHERE HITE, *THE HITE REPORT: A NATIONWIDE STUDY OF FEMALE SEXUALITY* (1976).

122. Anne Koedt, *The Myth of the Vaginal Orgasm*, in *RADICAL FEMINISM* 198 (Anne Koedt et al., eds., 1973).

123. *Id.* at 199.

124. Gerhard, *supra* note 103, at 449.

"celebration of sexual freedom and the critique of sexual liberation, sex as pleasure and as danger, as liberation and exploitation."<sup>125</sup> This celebration of female sexuality<sup>126</sup> was soon submerged by competing efforts to deal with violence against women, workplace disparities, and issues of reproduction and motherhood.<sup>127</sup> This effort to change our society's approach to issues such as rape and sexual harassment has reinforced images of the role of sex in the law as violent and threatening.<sup>128</sup> It is not surprising, given the massive legal and cultural barriers to equality and autonomy that women have faced, that little emphasis placed on women's erotic selves,<sup>129</sup> and that other issues, including motherhood and work, have occupied the movement's attention.<sup>130</sup> The culture may be changing, however. The next generation may be both less scared and scarred by this history.

The medical establishment has only recently begun a serious exploration of female sexuality. The dearth of clinical trials and resultant data has created a serious information gap. More research is needed in a variety of areas,<sup>131</sup> including the "determinants of sexual desire in women."<sup>132</sup> The clitoris, now believed to be the centerpiece of female sexual response, has received little

125. *Id.* at 472.

126. In 1969, *The Sensuous Woman* brought cheap advice to women for achieving an orgasm: practice, practice, practice J., *The Sensuous Woman* 42-49(1969) ("Remember you are training your body to become a superb instrument of love. You'll never accomplish this with sporadic lessons . . . . After you have become accustomed to it, keep adding to the number of orgasms you achieve in each session. The minimum you should settle for is three or four and you should try for ten to twenty-five."). Although practicing alone with a vibrator was recommended, the end game was learning the technique for contact with men, who would never have the patience to help you. A more feminist approach was presented in THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, *OUR BODIES, OURSELVES—A BOOK BY AND FOR WOMEN* 44-48 (1976).

127. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 182 (2001) (" . . . legal feminism has, by and large, reduced questions of sexuality to two principal concerns for women: dependency, and the responsibilities that motherhood entails, and danger, such as sexual harassment, rape, incest, and domestic violence . . . . Curiously, since the end of the so-called "sex wars" in the 1980s, it seems that legal feminists have ceded to queer theorists the job of imagining the female body as a site of pleasure, intimacy, and erotic possibility.").

128. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 75, at 218; Catherine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L. J. 1281, 1293-94 (1991).

129. See Franke, *supra* note 127, at 181 ("Without a doubt, when it comes to sex, [feminists] have done a more than adequate job of theorizing the right to say no, but we have left to others the task of understanding what it might mean to say yes.").

130. *Id.* at 183 ("The centrality, presumption, and inevitability of our responsibility for children remain a starting point for many, if not most, legal feminists."). See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

131. See generally Rosemary Basson et al., *Report of the International Consensus Development Conference on Female Sexual Dysfunction: Definitions and Classifications*, 163 J. UROLOGY 888, 890 (2000) ("Female sexual dysfunction is an under-researched and poorly understood area . . . . Anatomical studies are needed to delineate more precisely the pathway of vital nerves, arterial inflow and venous drainage of the multiple organs involved in normal female sexual function. . . . Biological mechanisms of sexual arousal and orgasm in women are poorly understood at present . . .")

132. See Jennifer R. Berman & Irwin Goldstein, *Female Sexual Dysfunction*, 28 UROLOGY CLINICS OF NORTH AMERICA 405 (2001) (on file with author) ("Berman and Goldstein").

specific attention.<sup>133</sup> Despite the fact that more than half of all women, as reported in the Kinsey and Hite reports, do not experience orgasm through penetration alone,<sup>134</sup> the reasons behind women's lack of sexual responsiveness have generally been ignored.<sup>135</sup>

In summary, although the medical establishment invested little energy in the science of the female sexual response, it started out with some practical information about what seemed to work. Vibrators were legally sold for many years, and medically endorsed as a means to achieving orgasms in women. When Freud posited an elaborate theory on the importance of the female orgasm, this theory supported cultural norms regarding female sexuality that assumed female subservience and dependence on men, and diminished the importance of the female clitoral orgasm.<sup>136</sup> Although vibrators have a history and tradition of unregulated use, it is a history and tradition laced with gender discrimination. Although current constitutional doctrine assesses a practice according to the depth of its entanglement in history, this history of vibrators is a stark reminder that learning from history is often a better approach than repeating history.

### III. REGULATION OF SEX AIDS: UNDERSTANDING THE IMPLICATIONS FOR WOMEN

Throughout history, anatomical differences between men and women defined social and political rights, in turn reinforcing a culture of gender role-playing. Deeply embedded cultural and legal roles are hard to shed. Trying to undo the vast number of gender stereotypes embedded in government regulation required challengers to emphasize similarities and minimize differences, lest the differences be seized upon to justify discrimination.<sup>137</sup> For example, recent equal protection analysis has chipped away at the legal barriers that prevent individuals from breaking out of gendered roles in public life.<sup>138</sup> In breaking down explicit gender based rules, many of the legal cases have emphasized equality between male and female, the minimal nature of gender

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133. *See id.* at 408. Berman & Goldstein note that:

In anatomy texts, the clitoris is not displayed accurately in terms of size, and its neurovascular supply rarely is described. The bulbs are omitted, or, if described, their relationship to other cavernous tissue is not described.

134. HITE, *supra* note 121, at 229-34.

135. *See generally*, Berman & Goldstein, *supra* note 132.

136. MAINES, *supra* note 21, at 112.

137. *See* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1673 (1997) ("By championing a norm of gender neutrality, this strategy [of eliminating government regulation of gender roles] also reflected the assumption that state inaction with respect to gender would best ensure women's equality.")

138. *See, e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971) (striking down an Idaho statute preferring men to women as administrators of estates); *United States v. Virginia*, 518 U.S. 515 (1996) (striking down prohibition of entry of women into state's military academy on equal protection grounds).

differences, and how women are capable of competing fully with men.<sup>139</sup> Although a step ahead in the journey towards a new tradition and history of equality, there are problems with this approach. First, where there are distinct differences between male and female, the law often fails to take account of them.<sup>140</sup> Second, in taking into account legitimate differences, courts and society may compensate in ways that make it worse.<sup>141</sup> Third, gender discrimination is often the by-product of a male-ordered society where women's needs are disregarded in the legislative calculus resulting in legislation that is facially neutral and disparate in its impact.<sup>142</sup> Finally, the discrimination may be the product of private discrimination, and therefore not amenable to constitutional challenge.<sup>143</sup> The difficulty is proving intentional discrimination, as opposed to conscious ignorance or benign obliviousness.<sup>144</sup>

Nevertheless, equality cannot be achieved without recognizing obvious differences while simultaneously not yielding to the temptation to confuse them with purely culturally conditioned responses. For example, achieving equality in the home and workplace for parents means a blunt recognition of some biological responsibilities that cannot be divided (giving birth and breast-feeding), along with all the social responsibilities that can be divided (almost every other aspect of raising a child), and then re-writing the roles to change the work and home scene.<sup>145</sup>

To state the obvious, the male and female anatomies differ, but these differences have both more and less importance than our culture has recognized.<sup>146</sup> Medical care, based on different anatomies, may be different in

139. See, e.g., *Virginia*, 518 U.S. at 541-42.

140. See, e.g., Higgins, *supra* note 137 at 1673 ("Despite its success, this strategy [enforcing the norm of gender neutrality] may have overestimated the value of gender neutrality and underestimated the possibilities for affirmative state intervention on behalf of women."); MacKinnon, *supra* note 128, at 1288-89. ("Where the analogy seems to work, that is, where the sexes are reasonably fungible and the inequalities can be seen to function similarly—as in some elite employment situations, for example—equality law can work for sex. Where the sexes are different, and sexism does not readily appear to work like racism—as with sexual abuse and reproductive control, for example—discrimination as a legal theory does not even come up."); Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 455 (1995) (noting failure of the Supreme Court to consider equal protection issues with regard to regulations governing reproduction such as abortion).

141. For example, divorce reforms that made laws gender neutral and removed custody presumptions in favor of the mother ended up hurting many women, especially financially. See LEONORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

142. See *Personnel Admin. v. Feeney*, 442 U.S. 256 (1979) (holding that although 98% of women were excluded from a facially neutral veteran's preference scheme, no equal protection violation was found because some men were excluded from receiving the preference as well).

143. Higgins, *supra* note, 137 at 1674.

144. See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 296-324 (1997) (concluding that under current precedent, the Supreme Court will only strike down facially neutral legislation "when the only plausible conclusion is that discrimination caused the result that is in question.").

145. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

146. See generally NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN AND THE LAW* (1998).

a number of key respects.<sup>147</sup> For instance, the nature of women's sexual drives has not been adequately emphasized or medically explored.<sup>148</sup> Moreover, the inaccurate belief persists that what pleases men sexually pleases women generally.<sup>149</sup> But what is sauce for the goose is not always sauce for the gander. The anatomical and psychological differences between men and women play a critical role in their different sexual responses, as do cultural roles and lack of sex education.<sup>150</sup> Until recently, little attention has been paid to these differences. Ignorance hardly has resulted in bliss in these circumstances.

When states have banned vibrators and other sex aids,<sup>151</sup> litigation strategies challenging these laws have reinforced existing biases involving women's sexuality. Lawyers have framed their arguments in a language that asserts that banning these devices would harm women who need them medically to achieve orgasm. The reality is that many healthy women find their normal sexual needs often are met with sex aids better than through traditional male-female sexual positions.

Use of the terms "dysfunction" and "medical need" in litigation reinforces a view of female sexuality through a male-oriented lens.<sup>152</sup> Instead of fighting for general recognition that the use of vibrators makes achievement of orgasm easier for a broad range of women, past litigation strategies have opted to chip away at the laws by using socially sympathetic plaintiffs. This strategy is understandable: offering plaintiffs who are anorgasmic married women using

147. See Sarah Knab Keitt, Catherine Wagner, Cynthia Tong, and Sherry A. Marts, *Positioning Women's Health Curricula in US Medical Schools*, MEDSCAPE GENERAL MEDICINE 5(2), 2003 (noting lack of a women's health curriculum in medical schools despite important differences in women's responses in conditions common to women and men, such as lung cancer and heart disease), available at <https://www.medscape.com/viewarticle/455372> (last visited Mar. 20, 2004) (access to this article may be obtained through free registration at the Medscape website; on file with author).

148. See *supra* notes 131-136 and accompanying text.

149. See Cynthia Gorney, *Designing Women: Scientists and Capitalists Dream of Finding a Drug that Could Boost Female Sexuality. There's One Little Problem . . .*, WASH. POST, Jun. 30, 2002, at W08.

150. LEONORE TIEFER & ELLYN KASCHAK, A NEW VIEW OF WOMEN'S SEXUAL PROBLEMS (2002).

151. See *supra* note 2 (listing statutes). Morality seems to be the sole justification, despite the fact that the use of these devices could improve existing marriages. No health concerns are cited, such as use of the devices will lead to blindness. Health concerns seem to cut in the opposite direction. The devices, used alone, could prevent pregnancy and sexually transmitted diseases.

There may be other health benefits as well. A recent study has shown that in males, masturbation may help prevent cancer. See "Masturbating may protect against prostate cancer," NEW SCIENTIST, July 16, 2003 (available at <http://www.newscientist.com/news/news.jsp?id=ns99993942> (last visited April 6, 2004)) ("The protective effect is greatest while men are in their twenties: those who had ejaculated more than five times per week in their twenties for instance, were one-third less likely to develop aggressive prostate cancer later in life. . . . The results contradict those of previous studies, which have suggested that having had many sexual partners, or a high frequency of sexual activity, increases the risk of prostate cancer by up to 40 percent. The key difference is that these earlier studies defined sexual activity as sexual intercourse, whereas the latest study focused on the number of ejaculations, whether or not intercourse was involved.").

152. There is a vibrator-like device approved by the FDA. See 21 C.F.R. §§ 884.5940, 884.5960 (2004).

the sex devices with their husbands,<sup>153</sup> women who began using the devices with their husbands but who now are single (no reason for the split revealed),<sup>154</sup> or disabled women allows the court to acknowledge female sexual needs without challenging the primacy of marriage and the male role.<sup>155</sup> Courts seem more willing to see a constitutional right of women to the private use of these devices as long as they have a legally sanctioned relationship with a man or as long as the use of the device is for medical or therapeutic purposes, suggesting a quasi-prescription requirement.<sup>156</sup> Thus to use a vibrator, women have to be sick or married.<sup>157</sup> Practicing sound litigation strategies, lawyers have chosen plaintiffs who have the best chance of chipping away at the law, given cultural bias, but that also maintain existing legal restrictions on women's sexual fulfillment in general.<sup>158</sup>

Arguing within the quasi-prescription rubric in the Kansas case *State v. Hughes*, a psychologist and sex therapist testified on behalf of a defendant (charged with selling various devices) that vibrators and dildos were used in the treatment of anorgasmic and incontinent women. The justifications for use of the prohibited sex toys included: (1) some women are physiologically less responsive and use of the vibrator or dildo lowers the threshold for response; (2) by producing intense stimulation and orgasm, these devices break down the patient's orgasmic inhibitions; and (3) the dildo or vibrator helps the patient perform Kegel exercise to improve pelvic muscles.<sup>159</sup>

The strategy was successful. The Kansas court held that the "statute is impermissibly overbroad when it impinges without justification on the sphere of constitutionally protected privacy which encompasses therapy for medical and psychological disorders."<sup>160</sup> Note that the exception that the Kansas Supreme Court carved out of the statute defines a female pathology. In

153. *Williams v. Pryor*, 240 F.3d 944, 955 (11th Cir. 2001).

154. *Id.*

155. Some challenges are still possible based on "as applied" challenges to the law. See *Red Bluff Drive-In v. Vance*, 648 F.2d 1020 (5th Cir. 1981).

156. The fact that the state accomplishes its goal through a ban on the sale of vibrators, rather than random bed checks, does not make a difference. As the Supreme Court noted in *Carey v. Population Services*, "such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*." *Carey v. Population Services Int'l*, 431 U.S. 678, 688-89 (1977).

157. Even the Food and Drug Administration, in its regulation of vibrators, feels the need to limit its definition to the euphemistic "therapeutic use." 21 C.F.R. §§ 884.5940, 884.5960 (2004).

158. See generally David C. Minneman, *Constitutionality of State Statutes Banning Distribution of Sexual Devices*, 94 A.L.R. 497 (2001) (advising, that "[t]estimony of an expert witness, such as a state-certified psychologist and sex therapist may be helpful. Such an expert might, for example, testify that a dildo vibrator is effective and commonly prescribed in the treatment of both anorgasmic and incontinent women . . . and that if such devices were to become not readily available to the general public, anorgasmic women would be substantially impacted.").

159. 792 P.2d 1023, 1025 (Kan. 1990).

160. *Id.* at 1031-32 ("We hold the dissemination and promotion of such devices for purposes of medical and psychological therapy to be a constitutionally protected activity.").



Louisiana and Colorado, similar laws were struck down as being overbroad because they contained no exception for medical and therapeutic uses.<sup>161</sup>

With regard to sex aids, rather than conceptualizing these devices as necessary to correct sexual dysfunction in women, it would be more accurate to recognize that many women may not necessarily achieve orgasm through the traditional sexual positions that allow a male to achieve orgasm.<sup>162</sup> Because of anatomical differences, the sexual position that is most likely to guarantee procreation and male orgasm may be much less likely to achieve orgasm in females because it does not stimulate the clitoris.<sup>163</sup>

Studies that are more recent indicate that forty-three percent of women experience sexual problems.<sup>164</sup> These numbers are consistent with earlier studies of the "frigidity" rates of women.<sup>165</sup> It is a wonder that the high percentage alone does not alert us to the fact that it may not necessarily be the woman who is sexually dysfunctional. A more logical conclusion to be drawn from the data might be that it is the culture, one that fails to investigate the issues and to educate its citizenry, that is dysfunctional. Rather than claiming this high percentage of sexual problems is a treatable "medical condition," it could be recognized as a "social condition," leading to much-needed research and education of both women and men.<sup>166</sup>

If women are to achieve orgasm on a regular basis, as men do, apparently some method in addition to, or other than, the traditional implantation of the penis into the vagina often has to take place. The idealization of heterosexual sex generally as requiring male erection and vaginal penetration likely arose

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161. *State v. Brenan*, 772 So. 2d 64 (La. 2000); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).

162. See MAINES, *supra* note 21, at 48-49; DONALD SYMONS, *THE EVOLUTION OF HUMAN SEXUALITY* 87 (1979) (suggesting "that many women do not orgasm during intercourse, or do so sporadically, simply because sexual intercourse is an extremely inefficient way to stimulate the clitoris.").

163. KINSEY, *supra* note 119, at 567-93; HITE, *supra* note 121, at 136 (survey data shows that only 30% of women achieve orgasm during intercourse); *id.* at 51 (reporting that penetration is rarely used by women as a means of achieving orgasm); WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, *HUMAN SEXUAL RESPONSE* 133 (1966) ("Understandably, the maximum physiologic intensity of orgasmic response subjectively reported or objectively recorded has been achieved by self regulated mechanical or automanipulative techniques. The next highest level of erotic intensity has resulted from partner manipulation, again with established or self-regulated methods, and the lowest intensity of target-organ response was achieved during coition.").

164. See Kevin L. Billups, *The Role of Mechanical Devices in Treating Female Sexual Dysfunction and Enhancing the Female Sexual Response*, 20 *WORLD J. UROLOGY* 137-41 (2002); Edward O. Laumann et al., *Sexual Dysfunction in the United States: Prevalence and Predictors*, 281 *J. AMER. MED. ASS'N* 537, 540 (1999) (showing that sexual dysfunction is more prevalent among women than men). Other studies estimate that 30-50% of women suffer sexual problems. Berman & Goldstein, *supra* note 134, at 405. These dysfunctions include hypoactive sexual desire disorder, sexual aversion disorder, orgasmic disorder, and sexual pain disorders. *Id.*

165. See MAINES, *supra* note 21, at 61 (noting studies showing rates of 66-75% and 60-90%).

166. Reasons to use a vibrator may also include: use by persons who are not in relationships, by choice or life circumstances and use as a tool for learning to have an orgasm or increasing the intensity of orgasm.

because it is a good position for procreation and male orgasm.<sup>167</sup> If not satisfied by this model of heterosexual sex, women risked being labeled frigid,<sup>168</sup> or learned the adaptive behavior of “faking it,”<sup>169</sup> a talent that Meg Ryan demonstrated to the surprised Billy Crystal in a restaurant in the movie *When Harry Met Sally*.<sup>170</sup> Like Crystal’s character, most college men in a study were almost certain that women never faked orgasm with them, while almost all the college women acknowledged “faking it” some of the time.<sup>171</sup>

In summary, very little research has been done in the area of female sexuality; as a result, almost half of women are labeled sexually dysfunctional (if in fact the other half are even being honest about their sex lives). Furthermore, several states have criminalized the sale of devices that aid female orgasm. Lawyers have smartly noted that the most sympathetic challenges involve those brought by “dysfunctional” females. Consequently, these cases are brought to the attention of the courts. Thus, women currently must be tagged with the medical and legal label of “dysfunctional” in order to gain access to devices that help women achieve orgasm. These laws are unfair, stigmatizing, misguided, and “uncommonly silly.”<sup>172</sup> The question that remains is whether these laws are unconstitutional after the Court’s decision in *Lawrence*.

#### IV. THE ANATOMY OF THE TYPICAL CASE

To fully understand the sex aid cases and their constitutional implications, it is important to picture the scene of the crime. For example, Texas (which spawned the *Lawrence* case with its anti-sodomy law) has an anti-vibrator law forbidding the sale of devices “designed or marketed as useful primarily for the stimulation of human genital organs.”<sup>173</sup> The following scenario is from an actual Texas case, *Webber v. State*,<sup>174</sup> chosen for the court’s clear explanation of the criminal act and subsequent trial.<sup>175</sup>

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167. This is consistent with other evidence that sexuality has not been linked to the pursuit of mutual pleasure. See SUSAN BROWNMILLER, *AGAINST OUR WILL, MEN, WOMEN, AND RAPE* (1975).

168. See discussion *supra* note 118; MAINES, *supra* note 21, at 55, 61, and 117 (quoting FRANK CAPRIO, *THE ADEQUATE MALE* 70 (1952)).

169. Celia Roberts et al., *Faking It: The Story of ‘Ohh!’* WOMEN’S STUD. INT. FORUM. 18, nos. 5-6 (1995).

170. *WHEN HARRY MET SALLY* (Castle Rock Entertainment 1989).

171. *Id.*

172. *Lawrence v. Texas*, 123 S. Ct. 2472, 2498 (2003) (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (Stewart J., dissenting)).

173. TEX. PENAL CODE ANN. § 43.21(a)(7).

174. 21 S.W.3d 726, 728-29 (Tex. Crim. App. 2000).

175. The statute in issue in this particular case required the device to be used “primarily” for genital stimulation. One statute, however, does not contain this qualifier, only that the devices may be used for the purpose of genital stimulation. See VA. CODE ANN. §18.2-373 (1996 & Supp. 2003). This definition is so broad that zucchinis and cucumbers might fit the statutory language, thus making the vegetable section of the supermarket a likely place for the next stakeout. As one court noted, this

In 2000, two police officers were working an undercover operation in Travis County, Texas. Deputy Sheriff Carlin was a female officer, and the other officer, who is narrating below, posed as her husband:

[We] entered the Adult Video Store, a licensed sexually oriented business. [The suspect] came forward and offered to help Carlin. Carlin told [the suspect] that she was experiencing marital problems and that she was looking for a vibrator – something for sexual gratification. [The suspect] showed Carlin her four best selling devices. [The suspect] placed batteries in these devices and demonstrated their varying range of speed and flexibility. Carlin selected one of the devices for which she paid [the suspect] thirty-six dollars and ninety-five cents.<sup>176</sup>

The Texas Appeals Court offered the following description of the ensuing trial:

During trial, the device Carlin purchased was referred to as a “dildo.” Carlin testified that there was no “mistaking the shape of this dildo for anything other than a male penis,” and that it was capable of stimulating the female sexual organ. She also testified that she did not believe the dildo she purchased could be used for anything other than sexual gratification. Under cross-examination, Carlin conceded that the dildo could be used as a doorstop or a paperweight, but testified that she would not use it for those purposes, and that it was not marketed for use as a doorstop or paperweight.<sup>177</sup>

The essence of the testimony was that if it looked like a dildo and could be used as a dildo, it was one.<sup>178</sup> Despite the flimsy yet clever, “paperweight defense,” the defendant was convicted.

Based upon this analysis, the Texas Court of Appeals affirmed the initial sentence of thirty days in jail and a fine of \$4,000.<sup>179</sup> The only consolation offered to the defendant in *Webber* was the concurring opinion of the female justice, noting the law’s waste of resources and quoting another justice: “Here

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ambitious legislative quest to stamp out devices to stimulate sexual responsiveness could also include viagra and penile implants, although it does not appear that prosecutorial resources have shifted to this area.

176. *Webber*, 21 S.W.3d at 729.

177. *Id.*

178. The Texas Court of Appeals judge refused to be confused by the argument that the statute did not define the word “dildo,” instead pronouncing quite authoritatively that a “dildo is an obscene device as a matter of law.” *Id.* Judge Dally cited a dictionary and apparently took judicial notice that “by common usage, a dildo is defined as ‘an object serving as a penis substitute for vaginal insertion.’” *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 633 (Phillip B. Gove ed., 1961)).

179. *Id.* at 732.

we go raising the price of dildos again.”<sup>180</sup> The thirty-day sentence imposed by the Texas legal system, however, would be considered light by Louisiana standards where, in the case of *State v. Brenan*, the jury sentenced a seller to four years of “hard labor” for a similar crime.<sup>181</sup> The Louisiana Supreme Court reversed the conviction on appeal, finding the vibrators were not obscene. Several judges in the intermediate appellate court in Louisiana, although agreeing with the reversal, found it necessary to note that allowing the use of sex aids did not connote approval: “We personally find the items seized to be shameful, reprehensible and disgusting.”<sup>182</sup> Questions of legality notwithstanding, these members of the judiciary shared the legislature’s moral disapproval of sex aids.

The *Webber* case imposes both a criminal and social stigma on sex aids. Moreover, these types of prosecutions each involve a state using its limited resources to chill behavior generally. Often the government prosecutes these cases under obscenity statutes that attach a tag of “morbid” and “shameful” activity to the use of these devices in private sexual conduct.<sup>183</sup> Although the sales sometimes take place in a public place (like the *Webber* case) or in a private home (such as the Passion Party thrown by Joanne Webb<sup>184</sup> or the sale of contraceptives in *Griswold*), the issue is the use of the prohibited items by consenting adults in private. Before *Lawrence*, and under *Glucksberg*, the Supreme Court would have begun the constitutional analysis by asking whether there was a tradition and history of protecting the sale of sex aids used for personal gratification.<sup>185</sup> After *Lawrence*, the discussion should focus on whether the government has any reason, other than moral disapproval, for policing consenting adults in their private bedroom activities.

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180. *Webber*, 21 S.W.3d at 732 (Smith J., concurring) (quoting *Regalado v. State*, 872 S.W.2d 7, 11 (Tex.App. 1994) (Brown, J., concurring.)).

181. 772 So.2d 64, 66 (La. 2000) (affirming reversal of conviction of defendant for promotion of obscene devices; defendant was sentenced to two years at hard labor on each of two counts and a \$3000 fine was imposed, but the trial court suspended the sentence and placed her on probation for five years before the conviction was reversed on appeal).

182. *State v. Brenan*, 739 So.2d 368, 373 (La. App. 1 Cir. 1999), *aff’d*, 772 So.2d 64 (La. 2000).

183. See, e.g., *Miller v. California*, 413 U.S. 15, 18 (1973) (discussing that, according to the Cal. Penal Code §311.2(a), obscenity requires “appeal to the prurient interest,” and “patently offensive . . . sexual conduct” and “prurient” was defined as “shameful or morbid”). See also, Mireya Navarro *Instead of Dr. Ruth, A Nurse Called Sue*, N.Y. TIMES, Feb. 19, 2004 (Sex adviser notes that “[s]hame fear, guilt and ignorance all get in the way of good sex, Ms. Johanson said, adding that based on the calls she receives, many Americans lack basic knowledge.”)

184. See *supra* notes 4-9.

185. See *supra* Part I.

V. LOOKING FORWARD: CAN THE RIGHT TO PRIVACY IN SEXUAL SATISFACTION BE RECOGNIZED AND PROTECTED UNDER *LAWRENCE*?

Constitutional case doctrine is creeping toward a broader understanding of adult life choices. Disengaging sex from marriage, *Eisenstadt v. Baird* prohibited the state from intruding on contraceptive decisions of persons who were not married.<sup>186</sup> The *Lawrence* decision disengaged sex from reproduction by protecting sexual relationships where procreation was not possible. Now, as gender, sex, and social roles are breaking free from the previous binary paradigm of male and female,<sup>187</sup> more emphasis on a "right to sex" may emerge in the law, a right that focuses on the pleasure of the act rather than a procreative purpose. *Lawrence* gives power to the value of sexual intimacy alone, unrelated to procreative issues such as contraceptives or abortion.

A. *Lawrence* and the Language of Liberty

The *Lawrence* opinion reflects a carefully constructed political compromise. As quickly as *Glucksberg* seemed to reduce constitutional guarantees of liberty to whatever could be protected in the legislative arena, *Lawrence* seems to bring back memories of *Griswold*. As far as liberty is concerned, *Lawrence* reiterates: "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."<sup>188</sup> It is an elegant discourse on individual autonomy and liberty.

Nevertheless, broad statements of individual rights are mixed with some clear limitations. The opinion has language that gives and then takes, sometimes in the same sentence. Thus, the Court's opinion announces that a "personal relationship . . . whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."<sup>189</sup> The Court is willing to declare a moderate expansion of our present concept of liberty, but quickly notes that our protection from state intervention is that we cannot be criminally convicted for it.<sup>190</sup> The Court reasoned that making the conduct criminal was an invitation to discrimination

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186. See *Carey v. Population Services, Inc.*, 431 U.S. 678, 687 (1977) ("Griswold may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny [*Eisenstadt* and *Roe v. Wade*], the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.")

187. See William N. Eskridge, Jr., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 239-41 (1999).

188. *Lawrence v. Texas*, 123 S. Ct. 2472, 2475 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

189. *Id.* at 2478.

190. *Id.*

and had a stigmatizing effect that infringed on "the dignity of the persons charged."<sup>191</sup> *Lawrence* is also clear that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."<sup>192</sup> Thus, same-sex marriage and military service were explicitly excluded from the ruling. There are other limits on the ethereal language too. The opinion's protection for intimacy applies only to consenting adults<sup>193</sup> in private spaces.<sup>194</sup> The signal that the Court is giving is that the liberty interest may seem broad in reach, yet easily can be trimmed back in application.<sup>195</sup>

From a pragmatic perspective, *Lawrence* was not written to praise liberty, but to bury *Bowers*.<sup>196</sup> Justice Kennedy highlighted the error made by the *Bowers* Court; he did not hold back condemnation of the reasoning or the ruling.<sup>197</sup> Because the point was to rid the Court of *Bowers*, defining the positive doctrinal parameters of liberty and privacy interests became less critical than negating the limits imposed by *Bowers*. Thus, although it is clear that *Bowers* is dead, it is unclear what doctrine lives on.

Justice Kennedy's majority opinion in *Lawrence* declined to mention the *Glucksberg* test.<sup>198</sup> Steering the Court away from previous substantive due process cases, Kennedy incorporated tradition and history into his analysis,<sup>199</sup> but with the twist that he examined it on a more specific and recent level.<sup>200</sup> Rather than attack the standard directly as one easily manipulated, Kennedy simply manipulates the standard, deftly showing by example the dangerous plasticity of the tradition and history doctrine. For example, Kennedy noted that the number of states prohibiting sodomy was decreasing, and, even among those that did prohibit it, there was a "pattern of nonenforcement with respect

191. *Id.* at 2482.

192. *Id.* at 2484.

193. *Id.* ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.")

194. *Id.* ("It does not involve public conduct or prostitution.")

195. See generally Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 104-05 (2003) ("[T]he Court has not committed itself to the full consequences of its position. It has crafted its opinion so as to allow itself flexibly to respond to the unfolding nature of public discussion.")

196. *Lawrence*, 123 S. Ct. at 2484 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.")

197. *Bowers* had been widely criticized and Justice Kennedy cited some of that criticism, most notably conservative critics. *Id.* at 2489 (citing CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION – A FIRSTHAND ACCOUNT* 81-84 (1991); RICHARD POSNER, *SEX AND REASON* 341-50 (1992)).

198. *Lawrence*, 123 S.Ct. 2472.

199. *Id.* at 2480 (although acknowledging that "for centuries there have been powerful voices to condemn homosexual conduct as immoral" the opinion stated that

200. *Id.* at 2479 ("[T]here is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter [but] instead sought to prohibit nonprocreative sexual activity more generally."). Kennedy also noted that between 1880 and 1995, prosecutions for same sex sodomy involved conduct in a public place. *Id.*

to consenting adults acting in private.”<sup>201</sup> Although using his version of the “history and tradition” standard to justify his analysis, Kennedy also more directly noted that historical and traditional condemnation of an activity by the majority should not automatically trump a liberty interest.<sup>202</sup> He undercut the point, however, by allowing recent history and tradition – or recent majoritarian decision-making or an “emerging recognition” – to define the liberty interest.<sup>203</sup>

Although the opinion essentially ignored *Glucksberg* in both name and spirit, the Supreme Court’s cryptic prose in *Lawrence* makes it difficult to determine what the substantive due process doctrine actually protects, and where and when it protects us from government morality monitors.<sup>204</sup> It is cheerfully free of comprehensible doctrine that could be applied in future cases, but instead favors a discussion at a high level of generality.<sup>205</sup> There is no fundamental right explicitly declared, although the Court does rely on other cases where fundamental rights were established or recognized.<sup>206</sup> Although heightened scrutiny would correlate with the Texas law’s demise, heightened scrutiny was not explicitly applied. The Court found morality could not be a “legitimate” justification for the law,<sup>207</sup> which would seem to signal the application of rational relationship review.<sup>208</sup> But this standard was never

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201. *Id.* at 2481.

202. *Id.* at 2480.

203. *Id.* (“[W]e think that our laws and traditions in the past half century are of most relevance here.”).

204. Justice Kennedy notes, for example, that, “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.” *Lawrence*, 123 S. Ct. 2472, 2475 (2003). Later, Justice Kennedy cautions:

This, as a rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

*Id.* at 2478.

205. For example, the *Lawrence* opinion opens with the following general statement:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

*Id.* at 2475.

206. The Court did use the word “fundamental” in its opinion. *Id.* at 2477 (noting that *Roe* “confirmed once more” that the “liberty” protected by the Due Process Clause “has a substantive dimension of fundamental significance in defining the rights of the person”). The Court also described the privacy right identified in *Eisenstadt* as a fundamental human right. *Id.*

207. *Lawrence*, 123 S. Ct. at 2484 (stating that the “Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”)

208. *See Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)(rational basis review requires a “legitimate legislative purpose furthered by rational means”).

enunciated either, and would be unlikely to lead to a negative result for any statute's constitutionality. Rational relationship review has meant a quick look and a green light.<sup>209</sup> It presumes the validity of the law, and does not require a contemporaneous legislative record of support, or even a particularly close means-end fit.<sup>210</sup> Rather, the challenger must negate possible bases of support.<sup>211</sup> Given that the *Lawrence* opinion seems to subject Texas to proving the legitimacy of the law, the Court is not adhering to standard rational relationship review. Thus, the Supreme Court remains free to decide whether protected liberty interests exist on a case-by-case basis, by applying the standard rational relationship review in cases where it does not want to extend the liberty interest, or applying the more amorphous *Lawrence* standard where it does want to extend the interest.<sup>212</sup>

### *B. Sex Aids and Liberty: The Doctrinal Parameters of Lawrence*

Does *Lawrence* mean that sex aids are protected from government "morals" regulation? Certainly, Justice Kennedy's opinion stated that sexual conduct in the bedroom between consenting adults fits within the general parameters of protected conduct.<sup>213</sup> *Lawrence* took privacy past the point where the right arguably could be limited to procreation. The language of *Lawrence* echoes the joint opinion in *Casey* by protecting decisional autonomy: "The Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."<sup>214</sup>

209. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) (legislative classification must be upheld under rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" and that "where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end'"); Ronald D. Rotunda & John E. Nowak, *CONSTITUTIONAL LAW* § 15.4 (6th ed. 2000) ("[T]he Supreme Court most often describes the basic standard of review to be used in substantive due process and equal protection cases as one under which the courts will uphold a law so long as there is a 'rational relationship' between the law and any 'legitimate interest' of the government. This form of review gives great deference to the legislature.").

210. *Id.* See also *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

211. See *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (upholding classifications that distinguished the mentally retarded from mentally ill persons, applying lower standards for civil commitment to the former category).

212. The beauty of this approach for the Court is that it allows the Supreme Court to return to letting the government win in other cases, without the messiness of defining a fundamental right or having to apply any particular test. This type of approach is similar to the Court's discarded approach in the obscenity cases known as the "I know it when I see it" system. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

213. See *Lawrence*, *supra* at 2484 ("[This] case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to the homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.") See also POSNER & SILBAUGH, *supra* note 10, at 1 (Sex is the "quintessential private activity [of] our culture.").

214. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992).



Indeed, some commentators have argued that the Supreme Court's privacy decisions – *Griswold*, *Eisenstadt*, and *Roe* – are based more accurately on a "right to sex" theory.<sup>215</sup> The argument is that more than decisional and bodily autonomy are at stake in the decisions because one could avoid the pregnancy and the child by not engaging in traditional peno-vaginal sex.<sup>216</sup> In other words, because abstinence or other forms of sexual gratification were not discussed as plausible alternatives, it can be inferred that the Supreme Court silently recognized an underlying right to adult consensual sexual activities.<sup>217</sup> *Lawrence* contributes to this argument because it explicitly recognizes the value of a sexual relationship, or sex as a component of self-identity, where there is no chance for procreation.<sup>218</sup> With no concern about a forced invasion of bodily autonomy (*Roe*) or the decisional autonomy involved in using contraception to prevent parenting (*Griswold* and *Eisenstadt*), *Lawrence* seems to rest on a right to "the personal and private life of the individual" in matters of sex.<sup>219</sup>

The question remains, however, whether the private use of sex aids would fall within the sphere of protected conduct that the *Lawrence* opinion describes. By its language, the opinion's protection seems to be limited to (1) consensual acts, (2) involving adult humans, (3) in private, who are engaged in (4) safe, (5) sodomy that (6) does not bear the affirmative sanction of the government.<sup>220</sup>

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215. See David Cruz, *The "Sexual Freedom Cases?" Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 325, 328 (2000) ("[T]he 'right to sex' interpretation is expressly grounded on what are taken to be the logical implications of these decisions; the interpretation does not stem merely from statements of the Court, which, in light of the abstinence gap in the expressed rationales, are inadequate to justify the cases' outcomes . . . . In sum, the 'right to sex' interpretation of the sexual freedom cases, in relying on the abstinence gap argument, treats the Supreme Court's sexual freedom decisions as establishing a right to engage in sexual activities for reasons other than procreation"). See also Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 FORDHAM L. REV. 1313, 1325 (1997) ("What *Griswold* and *Eisenstadt* protected for both married and unmarried individuals was the freedom to engage in heterosexual intercourse without fear of familial and reproductive consequences.").

216. Cruz, *supra* note 216, at 315-29.

217. An irony for women is that peno-vaginal intercourse subjects women to the risk of pregnancy with less likelihood of experiencing orgasm. *Roe* is considered a victory for women because it spares women from childbearing because of sex. Yet, the sexual position that resulted in the pregnancy might not have been the most enjoyable for them sexually. Catharine MacKinnon made a similar point more starkly when she stated that "women can have abortions so men can have sex." See Catharine A. MacKinnon, *supra* note 128, at 1300.

218. *Lawrence*, 123 S. Ct. at 2484. In contrast, many prior opinions seemed to focus on procreation as the right protected. See *Roe v. Wade*, 410 U.S. 113, 140-41 (1973) (holding that right to privacy included woman's right to an abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (indicating that marital privacy includes the right to use contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating procreation is "one of the basic civil rights of man," as it is "fundamental to the very existence and survival of the race").

219. *Id.*

220. Justice Kennedy noted:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It

The use of vibrators and other sex aids meets most of these criteria. For example, with regard to vibrators and other sex aids, assume that there is (1) at least one consenting (2) adult (3) acting in private. The use of sex aids is also (4) safe,<sup>221</sup> and (6) no affirmative government sanction is sought—all that is requested is noninterference with a private relationship between person and device. With regard to the specific limitations considered in *Lawrence*, then, the use of sex aids is different only in the nature of the private sexual act.

Furthermore, Justice Kennedy's opinion in *Lawrence* noted the stigma attached to the criminal conviction in *Lawrence* and that same stigma is present here. A conviction for selling a vibrator carries a serious criminal penalty,<sup>222</sup> often more serious than the penalty for sodomy in *Lawrence*.<sup>223</sup> Convictions for distributing an obscene object subject a defendant to the possibility of a jail term and fines, as well as the collateral consequences of a criminal conviction.<sup>224</sup>

Finally, sex aids implicate the other more general concerns reflected in *Lawrence* - both spatial autonomy and "an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>225</sup> First, the state laws reflect disapproval of private sexual expression in one's home. Second, as to freedom in intimate matters, Justice Kennedy's opinion in *Lawrence* stated, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."<sup>226</sup> Although he tends to focus on relationship bonds in this

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does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

*Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

221. If necessary, sex aids could contain warning labels like virtually every other consumer product sold in the United States.

222. See, e.g., *State v. Brenan*, 772 So.2d 64, 66 (La. 2000) (affirming reversal of conviction of defendant for promotion of obscene devices; defendant was sentenced to two years at hard labor on each of two counts and a \$3000 fine was imposed, but the trial court suspended the sentence and placed her on probation for five years before the conviction was reversed on appeal); *Webber v. State*, 21 S.W.3d 726, 728 (Tex. Crim. App. 2000) (defendant sentenced to county jail for 30 days and fined \$4000 for promoting an obscene device); *Regalado v. State*, 872 S.W.2d 7 (Tex. Ct. App. 1994) (conviction affirmed of defendant found guilty of possessing obscene devices - seventeen dildos called "Flexi-Lovers" - and sentenced to 30 days in jail and fined \$250); see generally discussion at notes 174-83, *supra*.

223. See *Lawrence*, 123 S.Ct. at 2482 ("The offense, to be sure, is a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged.").

224. *Lawrence*, 123 S.Ct. at 2482 (noting, for example, that convictions would have to be listed on job applications).

225. *Id.*

226. *Lawrence*, 123 S. Ct. at 2478. Cf. Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1123 (1998) (arguing that the constitutional right to

context,<sup>227</sup> partners in a relationship may use a vibrator to strengthen bonds; it can be an “addition to” rather than a “replacement” for a partner.<sup>228</sup> Even when used solo, it may improve sexual relationships by heightening one's own sexual awareness.

Moreover, although sex acts like sodomy occur within the context of two people, no longstanding relationship need exist. Rather, sodomy could occur in the realm of the “one night stand” category. Although *Lawrence* explicitly involved a two-person relationship, it presumably extends to casual interactions between individuals where “intimacy” is measured not in emotional but in physical terms. Similarly, persons, who neither desire to nor have a long-term partner do not have necessarily less of a sexual drive or right to sexual satisfaction. As such, there really should be no need to find a partner at all to qualify for some sexual privacy. Any right to engage in an intimate sexual relationship should necessarily imply the right not to engage in such a relationship with another person but instead to proceed independently.<sup>229</sup>

One's relationship with oneself certainly deserves some consideration. It is our right to our own thoughts, relationship choices, and sexual expression that *Lawrence* protects from governmental intrusion.<sup>230</sup> In the context of this case, that unconstitutional intrusion comes when the state seeks to label vibrators obscene and criminalize them because they may be used for autonomous sexual expression.<sup>231</sup>

### C. *The Subtle Shift of the Burden of Proof*

Justice Kennedy may have subtly switched the burden of proof from the challenger to the government in *Lawrence*, saying that Texas had tried to “control a personal relationship that . . . is within the liberty of persons to choose without being punished.”<sup>232</sup> Thus, this invasion of “liberty” needed to be justified by the state, with the presumption being that the space was protected from state intrusion.

Justice Kennedy accomplished this burden shift by stating that Texas had no “legitimate state interest” to justify the intrusion.<sup>233</sup> This language is

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privacy protects relationships, not individuals, and that once “individuals involved in reproduction are at odds, then the right of relational privacy fails to insulate them, either from the state or from the claims of one another”).

227. *Lawrence*, 123 S. Ct. at 2472.

228. *Id.* at 2478. The court stated, “It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.” *Id.*

229. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (the freedom to associate includes the freedom not to associate)

230. *Id.* at 2475.

231. See *supra* notes 11-13.

232. *Id.* at 2478.

233. *Id.* at 2484.

confusing, however, as "legitimate" often indicates a rational relationship standard of review, not one of strict scrutiny,<sup>234</sup> and states rarely have problems defending their laws under this more lenient standard where the law's challenger bears the burden of proof.<sup>235</sup> The Supreme Court, however, has occasionally struck down a law under this test, concluding, for example, that the "bare congressional desire to harm a politically unpopular group" was not a legitimate interest when it involved hippies,<sup>236</sup> the mentally retarded<sup>237</sup> or homosexuals.<sup>238</sup> Those cases are aberrational, and are often forgotten or distinguished, leaving the typical high level of deference to the states as the remembered and invoked norm.

If the Court were to shift the burden in these types of sexual privacy cases more explicitly, that small step would at least require states interested in protecting their morality law to provide a contemporaneous legislative record of justification. Though the justification need not be a compelling one, a legislature would have to consider its actions more carefully and would have to be prepared to explain them. This approach might discourage some legislation, and, at a minimum, force lawmakers to articulate the benefits and rationales of a given law.

In the case of sex aids, for example, rather than a blanket moral condemnation, arguments about their use would be brought to the legislature as a preliminary matter, and, if necessary, to the courts—but with a contemporaneous legislative record. Thus, the subtle burden shifting would force more explicit legislative justification and a concrete rationalization beyond "morality." The interest would have to be one that articulates more than an unembellished desire to dictate private adult sexual expression in consensual situations.<sup>239</sup> For example, when the Alabama legislature posits that

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234. See Anthony B. Sanders, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craig v. Giles*, 88 MINN. L. REV. 668, 673-74 (2004).

235. See, e.g., *Dallas v. Stanglin*, 490 U.S. 19 (1989); *Williamson v. Lee Optical*, 348 U.S. 483 (1955). See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 500 n.26 (1997).

236. See, e.g., *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (striking down regulation, on equal protection grounds, based on impermissible animosity towards hippies and their communes).

237. See, e.g., *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (finding state's zoning provision with regard to the mentally retarded failed equal protection rational relationship review). But see *Heller v. Doe*, 509 U.S. 312 (1993) (finding state's thinly justified distinction between the mentally ill and the mentally retarded was justified using the ordinary version of rational basis review).

238. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (striking down Colorado amendment preventing gays and lesbians from receiving protection within laws prohibiting discrimination based on an "irrational prejudice" under equal protection analysis, while noting the "unprecedented" breadth of the constitutional amendment as supporting its conclusion).

239. Indeed, the limits set out in *Lawrence* still allow the state to regulate sex involving minors, public sex, and bestiality. Prostitution may also be regulated for public health reasons as well as concerns about consent. Most laws against fornication have disappeared, although a few states still have them. POSNER & SILBAUGH, *supra* note 10, at 99-102 (both Arizona and New Mexico have repealed

vibrators are obscene,<sup>240</sup> suggesting they have no legitimate use, this characterization would have to be explained in light of the emerging medical literature and would be subject to some dispute. Unless the legislature is prepared to declare that achieving sexual satisfaction in 40% of the adult female population is an obscenity, or even that vibrators do not promote marriage, they will have difficulty justifying their reasoning. Ultimately, when forced to articulate their reasoning, at a minimum, they create a record of their reasoning for the courts and their constituents.

If used only in the cases where privacy and liberty interests are at issue, burden shifting could afford some constitutional protection, while maintaining the more common form of rational relationship review in other cases.<sup>241</sup> Although not a perfect solution, or one immune from mishandling or confusion, reading *Lawrence* in this manner recognizes a broader range of privacy interests and provides the potential for a greater degree of constitutional protection because it requires the legislature to give value to those interests in its initial legislative consideration, unlike ordinary rational relationship review where the legislature is not required to maintain a contemporaneous legislative record of reasoning.

#### *D. The Politics Underlying Lawrence*

*Lawrence* seems deliberately ambiguous in its reach. Much of the decision attacks the specifics of the *Bowers* holding rather than justifying any new approach, perhaps making *Lawrence* a *sui generis* case in which a majority of the Justices, aware of the growing gay rights movement in the United States, became increasingly uncomfortable with the rhetoric and result of *Bowers*.<sup>242</sup>

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their statutes since the time of publication). Georgia's fornication law was struck down as a violation of the right to privacy. In re J.M., 575 S.E.2d 441 (Ga. 2003).

Generally, with regard to bigamy, polygamy, and adultery, the right to the formal state sanctioned relationship of marriage may be enough to allow the state the legitimate interest in banning these acts based on financial and health protection of spouses and children. The distinction between sodomy and these acts is harm to third parties. See generally Mark Strasser, *Sodomy, Adultery, and Same-Sex Marriage: On Legal Analysis and Fundamental Interests*, 8 U.C.L.A. WOMEN'S L.J. 313 (1998) (arguing that adultery bans are constitutional because they promote marriage and family); Maura Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same Sex Marriage*, 75 N.C. L. REV. 1501, 1622 (1997) (concluding that "[u]nlike polygamy, same-sex marriage poses no threat to American ideals of separation of church and state, individual autonomy, equality of all men, and equality of men and women.").

240. The articulated interests of the states are generally to prevent obscenity, and to promote marriage and the family. See cases cited *supra* note 13.

241. See Higgins, *supra* note 137, at 1702 (suggesting review of gender based classifications that "would require actual consideration of the political process rather than speculation about the disadvantage of groups within that process").

242. *Lawrence v. Texas*, 123 S. Ct. at 2478-84 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986). Given the national conversation that followed *Bowers*, it would have been much more unlikely that a Justice on the Court would not have considered the subject in a more realistic way than in 1986. Justice Powell, in a now infamous story, told a clerk at the time of the decision in *Bowers v. Hardwick* that he

The Court has been educated; state legislatures have signaled a national shift in perspective on the issue.<sup>243</sup> Thus, the Court overturned *Bowers* in minimalist fashion, upholding and simultaneously restricting a basic right. This approach recognized and reflected a modest shift in popular opinion on the issue, and left it open to further dialogue.<sup>244</sup> It is a pragmatic recognition that the love that dare not speak its name has become part of our modern cultural discourse. In *Lawrence*, the Court attempted to capture the emerging cultural accord on the issue of criminalizing sodomy, while being careful not to endorse same sex marriage or gays in the military, two issues upon which a national consensus has not been reached.

### CONCLUSION

The decision in *Lawrence* reached the correct conclusion in granting constitutional protection to adult sexual privacy where consensual, non-public, and no harm to third parties is involved. At least temporarily, it disregarded the restrictive *Glucksberg* test. As much as *Lawrence* includes limiting language, the opinion also indicates a desire to expand the personal, private space of individuals under the Constitution. The prime evidence is its expansive reading of liberty, one that largely ignores the restrictive *Glucksberg* definition of fundamental rights. For all the criticism that could be leveled at Justice Kennedy for failing to write a clear, crisp, clean opinion that could serve as a guide in future cases, the obtuse language probably best reflects a workable compromise. The disappearance of the *Glucksberg* test, even if temporary, is reason enough to commend the result. In its place, liberty and privacy, in the abstract, are elevated to a more hallowed status, potentially foreshadowing a more expansive protection of these interests in future cases.

When considering sex aid cases after *Lawrence*, the courts should not view the situation from a male-centered definition of sexuality that reduces women's normal needs to pathologies or diseases or that ignores sexuality unrelated to procreation. Rather, courts should examine whether it is constitutionally permissible for a state to outlaw the sale of sexual devices that are used in the privacy of an adult's own bedroom. They should rationally conclude that the government has no such power. In the private realm of consensual adult sex

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had never met a homosexual. The clerk, who was gay, did not correct him. See JOHN C. JEFFRIES JR., LEWIS F. POWELL, JR. 530 (1994).

243. *Lawrence*, 123 S.Ct. at 2481 (noting only four states still enforced sodomy laws against homosexual conduct, and that 12 states had repealed their prohibitions since the *Bowers* decision); See generally Post, *supra* note 195, at 8, 89-109 (arguing that "constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture").

244. See Post, *supra* note 244, at 105 (noting that if *Lawrence*'s "ambiguity accurately capture[s] the essential ambivalence of American constitutional culture on the question of sexual orientation" the Court may not need to clarify it, but otherwise will have to resolve the tension if pressed to extend or limit the decision").

visceral distaste of a practice should not, absent a clear showing of harm, command judicial deference.

The banning of sex aids demonstrates the flaw in slavishly following history and tradition as a guide to a practice's legitimacy. A lack of concern about women's health issues has fueled a history and tradition that is oblivious to the realities of women's sexual selves. According undue weight to the history and tradition prong of constitutional analysis turns past neglect into the prologue for future oppression.

*Griswold* and *Eisenstadt* recognized that liberty requires a private space where the government cannot intrude. At that time, the private sphere was defined as intimate heterosexual relationships. As the Court has opened its eyes to the reality of other types of consensual adult relationships, however, the privacy principle has been equally applicable. By requiring legislatures to prove the legitimacy of their rationale before they pass legislation that infringes upon sexual privacy rights, the Supreme Court essentially imposed a higher bar, requiring at least some legislative knowledge and fact-finding before such restrictive legislative action is taken. Although theoretically the electorate could exercise control over legislators contemplating restrictions on sexual freedom and privacy, voter ignorance makes this political solution an ineffective safeguard in this context.<sup>245</sup>

Ultimately, however, the key to changing the current legal treatment of sex aids and their use does not lie solely within the court system. Real social change will come about through the same route that led to the more enlightened approach found in *Lawrence*—political action and education.<sup>246</sup> Political action at the state level—in the form of the repeal of state criminal sodomy laws—allowed the Supreme Court in *Lawrence* to point to the profound negative attitude of the nation to enforcing such laws.<sup>247</sup> Similar political activity and expressive activity can prompt activism and change in both legislative and popular opinion.<sup>248</sup>

Evidence of change is beginning show up in our cultural laboratories. Joanne Webb attempted to spread information about female sexuality through a

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245. See JOHN FEREJOHN, *Information and the Electoral Process*, in INFORMATION AND DEMOCRATIC PROCESSES 3 (John Ferejohn & James Kuklinski, eds. 1990). See generally Michael X. Delli Carpini & Scott Keeter, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996); Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413, 416-19 (1998) (discussing problems of widespread voter ignorance).

246. See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (1991) (arguing that courts "[at] best . . . can second the social reform acts of other branches of government.")

247. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003).

248. Commercial activity also fuels the spread of information. Sales representatives across the nation are logging up millions of dollars in sales for Passion Parties, Pure Romance, and Toys in Babeland. See Pamela Sitt, *The Party That Could Get You Arrested in Texas: In-home Sex Toy Sales Make for Naughty but Increasingly Mainstream Fun*, SEATTLE TIMES, February 2, 2004 at E1; see also *Williams v. Pryor*, 220 F.Supp.2d at 1294 (noting widespread advertisement and use of both vibrators and the erectile dysfunction medication Viagra).

"Passion Party."<sup>249</sup> Her prosecution for distributing sex aids may prove to be an even greater contribution to sex education because it provides an opportunity for greater public awareness of the issue and may galvanize opposition to such laws. The "Vagina Monologues" is playing at local theaters. Cable television is showing the repeat of the popular "Sex and the City" series where vibrators are openly discussed as a normal part of the characters' sex lives. Although these changes will not likely result in the immediate "massive disruption of the social order"<sup>250</sup> envisioned by Justice Scalia, they give us reason to hope. Given the ignorance and discrimination that has characterized sex and gender issues, reappraisals of our cultural, scientific, legislative, and judicial attitudes toward sexuality are long-awaited and welcome.

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249. *See supra* notes 4 and 5.

250. *See supra* note 1.